THE CONVEYANCER
AND
PROPERTY LAWYER

VOL. 24, NO. 4 JULY–AUGUST, 1960

CONVEYANCER'S NOTEBOOK

CONSULTATION WITH PLANNING AUTHORITY PRIOR TO PURCHASE

There is an interesting decision of the Minister on a planning appeal noted in [1960] J.P.L. 440. The inspector reported in favour of the appeal on planning grounds, but the Minister did not agree with him. He, however, allowed the appeal, for he felt obliged to have regard to the fact that the appellant bought the site on the clear understanding after twice consulting the local planning authority in 1953 and in 1956 that there would be no objection to the proposed development. At first blush this seems eminently satisfactory, but second thoughts suggest that this may not be so. What does "consulting the local planning authority" mean? If it means, as seems probable, the planning officer or members of his department, the local authority which is in fact the planning authority were not consulted at all and their statutory powers have been rendered nugatory by members of their staff. If the appellant wanted a firm decision before he bought he should have applied for outline permission. If "off the record" discussions are going to be brought up against planning departments on appeals to the Minister, planning officers are likely to become very much more cautious and these discussions, which are very useful in smoothing the way before formal applications are made, may tend to disappear. There is a good deal of delay in getting planning decisions, but the delay will increase if it proves impossible to try to meet the authorities' views in advance.

WHEN IS AGREEMENT REACHED ON THE TERMS OF A LEASE

When the terms of a contract for sale or a lease are in course of being agreed, the common understanding of solicitors is that there is no binding contract until exchange. Harman J. said in

Hollington Bros., Ltd. v. *Rhodes* [1951] 2 T.L.R. 691, 694: "It is a commonplace that in many, indeed, in most cases, where a lease is to be granted everything remains in negotiation until the lease and its counterpart are finally exchanged between the parties, and it seems to me impossible to spell out of the course of business which I have described, and which appears from the correspondence, anything more than the ordinary course of negotiations." This clear rule has now been seriously breached by the decision of Buckley J. in *Beesley* v. *Hallwood Estates, Ltd.* [1960] 1 W.L.R. 549 (noted *post*, p. 328). (In passing, it seems rather curious that the decision is not thought worthy of reporting in the full reports.) The case deals with a number of points but in the end the decision turns on the position where the terms of the draft lease have been agreed, the lease and counterpart engrossed for execution and the lease executed but not exchanged against the counterpart. The learned judge held that as soon as the lease was sealed the lessor was bound subject only to the lessee's handing over the counterpart. The lease was delivered in escrow on sealing and the only implied condition was the handing over of the counterpart. No doubt the lessor could add other conditions, but with respect it would be much happier if it were laid down that delivery, as distinct from sealing, did not take place until the solicitor indicated, expressly or impliedly, that this was so, nor would it appear that such a rule would in any way conflict with *Naas* v. *Westminster Bank* [1940] A.C. 366. The question of delivery is one of intention and surely the intention is that to be found in the words of Harman J. cited above.

A Lease Stone

We are indebted to Dr. E. O. Walford for drawing our attention to a lease stone, still perfectly legible, at Lostwithiel. Set on the external corner of the building, it reads:

WALTER KENDAL OF LOSTWITHIELL WAS FUNDER OF THIS HOUSE IN 1658

HATH A LEASE FOR THREE THOUSAND YEARES WHICH HAD BEGINING THE 29TH OF SEPTEMBER ANNO 1652

Why there was a delay of six years before Walter Kendal managed to build we do not know. It can hardly have been due to a planning appeal.

Can any of our readers throw any light on the subject? Were these stones ever very common? And were they accepted as evidence of the lessees' interest? If a false claim were made, it is unlikely that the question would remain unchallenged for very long.

RENTCHARGES IN REGISTERED CONVEYANCING—IV

By Theodore B. F. Ruoff, Solicitor

(6) FAILURE TO CREATE A RENTCHARGE

The classic method of creating a legal rentcharge is by way of reservation,[1] but in registered conveyancing a rentcharge may be either reserved[2] or else granted in any form which sufficiently refers to the land out of which the rentcharge issues, by quoting the title number.[3] The definition of "conveyance"[4] does not appear to embrace the grant or reservation of a rentcharge, so that although a conveyance of freehold land without words of limitation is capable of passing the fee simple,[5] it seems probable that the grant or reservation of a rentcharge requires the use of some words, if not of limitation strictly so-called, at least of indication, if the rentcharge is to be either perpetual or for a term of years absolute.[6] The position has been judicially stated, thus: "I conceive that words of inheritance are not essential to the creation of a perpetual rentcharge, if the intention to create it as a perpetual rentcharge is clearly expressed, and there are words of direct and immediate reference from which limitations can be gathered which exhaust the fee simple in the rentcharge."[7] Again, a rentcharge cannot consist of a fluctuating, unascertainable and indefinite sum,[8] although a rent, the amount of which may fluctuate according to the happening of certain events, is not an uncertain one.[9]

When the parties to a transaction intend to create a rentcharge, not as the consideration for a purchase, but for some ancillary purpose such as that of paying for the repair of roads, or for the maintenance of services and property in common use by flat holders, they frequently fail to do so. In one case[10] it was held that a

1 Law of Property Act, 1925, s. 206 (1); Sched. V, form 6.
2 Land Registration Act, 1925, s. 18 (1) (*d*).
3 *Ibid.* s. 18 (1) (*b*); Land Registration Rules, 1925, r. 113.
4 Law of Property Act, 1925, s. 205 (1) (ii).
5 *Ibid.* s. 60 (1).
6 *Ibid.* s. 1 (2) (*b*).
7 *Per* Clauson J. in *Grant* v. *Edmondson* [1930] 2 Ch. 245, at p. 254; affirmed [1931] 1 Ch. 1. Two Irish cases under the "old" law are also of interest. They are *Re Gillman's Estate* (1876) 10 I.R.Eq. 92, at p. 94; and *Re Stinson's Estate* [1910] 1 I.R. 47.
8 *Steele* v. *Bosworth* (1864) 18 C.B.(N.S.) 22; *Simey* v. *Marshall* (1872) L.R. 8 C.P. 269.
9 *Re Knight, ex p. Voisey* (1882) 21 Ch.D. 442.
10 *Morland* v. *Cook* (1868) L.R. 6 Eq. 252.

covenant between the parties to a deed of partition, to the effect that the expenses of making a sea-wall should be borne proportionately by them out of their lands by an "acre-scot," was a covenant which ran with the land, although that was not the only or even the main decision. It appears [11] that the covenant was merely a grant by each of the parties of a rentcharge of so much money as would be equivalent to his proportion of the total expenses of the repairs. But mere positive covenants alone to pay expenses of this sort, varying in amount, do not run with the land, and if they purport to be supported by a power of distress, that power is invalid for it can only be annexed to a rentcharge, although in fact the covenants in one such case were held to be enforceable on the novel and ingenious ground that those who take the advantage of a right of user must undertake the obligation of paying for it.[12]

If, in circumstances such as these, a transferee fails to charge a certain, or at least an ascertainable, sum on land, or an annual sum is not charged in perpetuity, or for a term of years absolute, or if it is not charged upon the land at all, there being merely a covenant to pay it, the Chief Land Registrar, having close regard to the particular language used, will refuse to accept that a rentcharge has been created. In such cases there is, of course, no question of creating a rentcharge title. Further, although an equitable charge may be noted as an incumbrance against the land charged [13] on payment of a fee of 10s. 0d.,[14] a mere covenant to pay a sum of money cannot be noted as an incumbrance on the register of title because it is not a covenant which runs with the land.

Examples

Below are given typical examples of provisions which are commonly inserted in transfers of registered land in parts of the South of England.

Example 1

Following the operative words of the transfer, there is the following reservation:

"Reserving unto the Transferor out of the land hereby transferred a perpetual yearly rentcharge of equivalent amount to one shilling in the pound on the gross assessment for rating purposes of the land hereby transferred and the buildings thereon or the

[11] *Austerberry* v. *Oldham Corporation* (1885) 29 Ch.D. 750, at pp. 774–775.
[12] *Halsall* v. *Brizell* [1957] Ch. 169.
[13] Land Registration Act, 1925, s. 49 (1) (*c*), (*f*).
[14] Land Registration Fee Order, 1930, para. VIII.

sum of —— pounds (whichever shall be the greater for the year in question) as a contribution towards the costs to the Transferor of the maintenance of the roadway tinted brown on the said plan such sum to be paid by equal half-yearly payments clear of all deductions on the —— day of —— and the —— day of —— in every year the first payment to be made on the —— day of —— next and to be a proportionate part from the date hereof TOGETHER with the remedies given by section 121 of the Law of Property Act, 1925 PROVIDED ALWAYS that such rentcharge shall cease upon the Transferor giving to the Transferee —— months' notice in accordance with the next clause hereof "

[The following clause contains a covenant by the Transferor to maintain the roadway, but allows him to terminate the liability if the roadway is adopted by the local authority on giving notice in writing of a specified length of time to the transferee.]

Here, the annual sum appears to be of an ascertainable amount and the real question is, whether a perpetual yearly rentcharge is a legal estate if it is liable to be determined by notice. As the clothing of a legal estate is not removed from a rentcharge merely because it is capable of being determined by either party by other means (as, for example, by a release by the rentowner, or through compulsory redemption at the instance of the terre tenant [15]), the writer concludes that the language used above creates a legal rentcharge which ought to be completed by substantive registration as well as being noted as an incumbrance against the transferee's land.[16] One thing is clear. The statutory definition of a " term of years absolute " [17] embraces a term either certain, or liable to determination by notice, so that if the rentcharge in the example had been created for a long term of years, there could be no doubt about its being a legal estate.

Example 2

Registered land is transferred together with a right in the following terms:

" TOGETHER with the right for the Transferee and his successors in title the owners or occupiers for the time being of the land hereby transferred in common with the Transferor and all other persons who have or may hereafter have the like right at all times hereafter and for all purposes to use the roadway shown and coloured brown on the plan annexed hereto the Transferee and his successors in title paying to the Transferor and his successors in title until the

[15] These are dealt with in a later article.
[16] Land Registration Act, 1925, s. 19 (2).
[17] Law of Property Act, 1925, s. 205 (1) (xxvii).

said roadway shall have been taken over by the local authority a yearly sum at the rate of one shilling in the pound on the gross assessment for rating for the time being on the land hereby transferred but so that such sum shall not in any case be less than —— pounds in any one year such sum to be the Transferee's contribution towards the cost to the Transferor of the maintenance and lighting of the said roadway and to be charged upon the land hereby transferred and paid by equal half-yearly payments without any deduction on the —— day of —— and the —— day of —— in every year the first of such payments to be made on the —— day of —— next "

In this instance the yearly sum is payable, not in perpetuity, nor for a term of years absolute, but merely until the road is adopted by the local authority. Therefore it cannot be a legal rentcharge. It will, however, be noted as an equitable annuity against the title of the transferee [18] when the transfer is registered.

Example 3

Often a transfer of part of registered land contains a covenant of the following kind:

" The Transferee hereby convenants with the Transferor that he the Transferee will pay to the Transferor and his successors in title the yearly sum of —— pounds or an annual sum equal to one shilling in the pound on the amount of the gross assessment for the time being in force for rating purposes in respect of the land hereby transferred (whichever shall be the greater) as a contribution towards the cost to the Transferor of maintaining and lighting the roadway shown and tinted brown on the plan annexed hereto until the said roadway shall be taken over as a public road such yearly sum to be payable by equal half-yearly payments without any deduction on the —— day of —— and the —— day of —— in each year commencing on the —— day of —— next "

In this case there is no charge on the land of the transferee, but merely a personal covenant by him to pay a sum of money. Therefore there is no incumbrance capable of being noted on the register. On registration of the transfer, the Chief Land Registrar will, for the convenience of persons dealing with the land and so that the covenant may not be overlooked in the future (but not because of any obligation imposed by the Act or Rules), enter a note in the proprietorship register, under the proprietor's name, stating that the transfer contains positive covenants.[19] In

[18] Land Registration Act, 1925, s. 49 (1) (*c*).
[19] See Practice Note 21 of those on Registered Land Conveyancing prepared by the Joint Advisory Committee of the Law Society and H.M. Land Registry.

addition, either a copy of the transfer will be bound up in the certificate, or the covenants will be typed on a separate sheet which is similarly bound up. On a change of proprietorship, the note and the copy covenants will be removed from the certificate, although any indemnity covenant entered into by the purchaser will be recorded in a similar manner to that above described.

(7) LOST GRANT

The notion of an inefficacious grant brings to mind the case where there is no grant at all—a subject which ought, perhaps, to have been dealt with under first registration of title. The idea behind the legal fiction of the presumption of a lost grant is, in a nutshell, this. The evidence of the actual enjoyment of a right or a title is so strong that it warrants the presumption that a lawful grant of the right or title once existed,[20] although that grant cannot today be produced. The Prescription Act,[21] which deals with this kind of presumption, does not apply to grants of rentcharges. Nevertheless, "a technical efficacy [is] given to the evidence of possession beyond its simple and natural force and operation."[22] And, as was said in one case which had nothing to do with rentcharges but which is yet in point[23]: "If an uninterrupted usage of upwards of seventy years, unanswered by any evidence to the contrary, is not sufficient to establish a right like the present, there are innumerable titles which could not be sustained."

For hundreds of years the courts have been willing to enforce a rentcharge on proof of its constant payment, when the deed creating it cannot be produced from the proper custody because it is alleged to have been lost.[24] Thus, the court is willing to presume, after a rentcharge has been consistently paid for a long period of time, that it had a legal origin,[25] and, rather than suppose that it has been paid gratuitously, or by mistake, the court will consider that its continuous payment rests upon a legal foundation,[26] and will enforce the rentcharge sometimes, even though the legal title to it may not be clear, or may even be defective.[27] It follows, therefore, that an application may be made for registration

[20] *Jenkins* v. *Harvey* (1835) 1 C.M. & R. 895. The principal authority on the presumption of a lost grant is *Dalton* v. *Angus* (1877) 3 Q.B.D. 85; (1878) 4 Q.B.D. 162; (1881) 6 App.Cas. 740.
[21] Prescription Act, 1832 (3 & 4 Will. 4, c. 71).
[22] *Bright* v. *Walker* (1834) 1 C.M. & R. 211, 217.
[23] *Jenkins* v. *Harvey* (1835) 1 C.M. & R. 877, 895.
[24] *Collet* v. *Jaques* (1669) 1 Ch.Cas. 120.
[25] *Foley's Charity Trustees* v. *Dudley Corporation* [1910] 1 K.B. 317.
[26] *Adnam* v. *Sandwich (Earl)* (1877) 2 Q.B.D. 485, 492.
[27] See *Re Herbage Rents, Greenwich* [1896] 2 Ch. 811.

of a rentcharge based upon the presumption of a lost grant, but it is unlikely that any better title than a possessory, or perhaps a qualified, one will be granted in the first instance.[28]

(8) INSPECTIONS AND SEARCHES

Persons Entitled to Inspect and Search

In regard to inspection of the register of title and documents filed at the Land Registry, the Land Registration Act, 1925, provides as follows [29]:

"Subject to the provisions of this Act as to furnishing information to Government departments and local authorities [30] and to such regulations and exceptions and to the payment of such sums as may be made or fixed by general rules, any person registered as proprietor of any land or charge, and any person authorised by any such proprietor, or by an order of the court, or by general rule, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the Registrar relating to such land or charge."

The Land Registration Rules provide that (subject to the above-mentioned provisions and subject also those governing the rights of inspection of judgment creditors [31] and the official receiver or trustee in bankruptcy [32]) "any entry in the register, and any document in the custody of the Registrar and referred to in the register, may be inspected by or under the authority of the proprietor of the land or of any charge or incumbrance thereon.[33]" The Rules also state that, except where otherwise provided, inspection of books and documents shall be in the discretion of the Registrar.[34]

It follows that the undermentioned persons (or their solicitors) are entitled, either to inspect the register, or to authorise someone else to do so, and it is noteworthy that a right of inspection carries with it a right to bespeak an office copy of the register or of documents referred to in it,[35] such as the filed copy of the deed which created the rentcharge:

(i) The registered proprietor of freehold or leasehold land, as to the register relating to that land.

[28] As to which, see the Land Registration Act, 1925, ss. 6, 7.
[29] *Ibid.* s. 112.
[30] As to which, see *ibid.* s. 129.
[31] *Ibid.* s. 59 (3).
[32] *Ibid.* s. 61 (10).
[33] Land Registration Rules, 1925, r. 287.
[34] *Ibid.* r. 290 (1).
[35] *Ibid.* r. 296.

(ii) The registered proprietor of a rentcharge title, as to the register of that title, because "land" includes a rentcharge.[36]

(iii) The registered proprietor of a charge, as to the register of the charged property, whether corporeal or incorporeal.

As will be seen hereafter, this list is not exhaustive.

Authority to Inspect

On a sale, an authority to inspect the register is customarily given by the proprietor's solicitors, being typed upon their notepaper, and it may take the form set out below. It is useful, in appropriate cases, to extend the authority to a proposing mortgagee's solicitors, and when this is done, and the authority is first used by the purchaser's solicitors, the Land Registry will return it to them so that it can be used in turn by the mortgagee's solicitors.

County or county borough .....

Title no. .....

Property .....

[Charge no. .....]

As solicitors for [*registered proprietor*] of *etc.* the registered proprietor of the land [*or* charge] above described, we hereby authorise Messrs. —— of —— who are the solicitors acting for [*purchaser*] [and Messrs. —— of —— who are solicitors acting for his mortgagee] to inspect the register of the above-mentioned title and any documents referred to therein.

[*Date*] [*Signature*]

When, apart from any purchase or mortgage transaction, a proprietor wishes to authorise some third person to obtain information about the entries in the register, official form 80, which is not printed, may be used.[37] A fee of 5s. is payable.[38]

Order of Court

The secrecy of the register is as jealously regarded by the Chief Land Registrar as by the legal profession, and he will not in any circumstances permit an inspection which is not clearly authorised by the statutory provisions. If the registered proprietor does not consent to an inspection, only "the court" can authorise one. This jurisdiction to order inspection or production of a register or

[36] Land Registration Act, 1925, s. 3 (viii).
[37] Land Registration Rules, 1925, r. 289: Sched., form 80.
[38] Land Registration Fee Order, 1930, para. XII (6) (*b*).

filed document is at present vested only in the High Court and the Court of Chancery of the County Palatine of Lancaster.[39] If, however, a subpoena is issued at the instance, for example, of the Lands Tribunal, out of the Crown Office of the High Court, this constitutes an order of that court and will be obeyed.

The Position between Landowner and Rentowner

The questions then arise whether, despite the privacy of the register, the registered proprietor of a rentcharge is entitled to inspect the registered title of his terre tenant, and whether the registered proprietor of land is entitled to inspect the registered title to a rentcharge which issues out of it. In this connection it will be observed from a number of the examples of registered titles which have been provided,[40] that the property register of a rentcharge title contains a cross-reference to the title number of the charged land when it is registered, and that the entry upon the charges register of a rentcharge as an incumbrance refers, in the remarks column, to the title number of the rentcharge title when it is registered. This being so, it is apparent that the rentcharge register is a "document in the custody of the Registrar and referred to in the register"[41] of the title to the land, and *vice versa*, so as to enable each party to inspect the register relating to the title of the other without the other's authority. This view of the law is believed to coincide with the wishes of practitioners in those northern areas where rentcharges abound.

Rule 288 Procedure

That being the situation where both land and the rentcharge issuing out of it are registered, it is necessary to consider the position where one or other of the interests is registered, but not both, or where registered land is burdened by several rentcharges, one or more, but not all of which, are registered.

The first part of the rule referred to in the sub-heading provides that the property register and the filed plan of any title may be inspected by any person interested in the land or in any adjoining land or in a charge or incumbrance thereon.[42] Clearly an unregistered rentowner is a "person interested in the land" out of which his rentcharge issues so as to allow him to inspect the property register and plan of the title without the authority of the registered

[39] Land Registration Act, 1925, s. 138 (1): Land Registration Rules, 1956 (S.I. 1956, No. 1024), r. 1. General rules have not been made in relation to the Durham Palatine Court or the county courts.

[40] See *e.g.*, p. 231, *ante*.

[41] Land Registration Rules, 1925, r. 287.

[42] *Ibid.* r. 288 (1).

proprietor. Equally clearly an unregistered landowner out of whose land a registered rentcharge issues is at liberty to inspect the property register and plan of the registered title to the rentcharge. A fee of 1s. is charged for the application for inspection.[43]

The second part of the rule is of much wider application, and it provides as follows:

" Other entries in the register and documents referred to therein, and the statutory declaration in support of a caution, may be inspected by any person interested, on giving three days' notice to the proprietor or on satisfying the Registrar that, by reason of the death of a sole proprietor, or for any other sufficient reason, he cannot obtain the requisite authority for or consent to such inspection, and that such inspection is reasonable and proper." [44]

This rule is ill-worded and needs a little analysis. For example, at first sight it might be thought that the applicant notifies the proprietor, although normally, in the very nature of things, he would not be in a position to do so. In fact, of course, it is the Chief Land Registrar who serves the notice, but, in view of the privacy of the registry, he will not do so unless he is satisfied, either that the applicant is a " person interested " in the registered land, or that the applicant cannot obtain the proprietor's authority, and that inspection is reasonable and proper. As mentioned earlier, it is considered that a rentowner has an interest in the land of his terre tenant and that the latter has an interest in the rentcharge, of such a nature, in either case, as would justify his being allowed to inspect the title thereto when it is registered. The application for inspection under rule 288 should be made by letter and should set out the precise interest which the applicant claims constitutes him an interested party. A fee of 10s. is payable.[45] On being satisfied of the propriety of the application, the Chief Land Registrar will serve notice of it by registered post on the registered proprietor, stating the grounds upon which it is made, and allowing him three days in which to object. This notice is deemed by law to be received by the addressee within seven days of its issue, exclusive of the day of posting.[46] Therefore, if no objection is received in the Registry within ten days, the Chief Land Registrar will notify the applicant that he may make the desired inspection, and it should be remembered that the right to inspect carries with it a right to make an official search of the register [47] and a right to bespeak an office copy of it.[48] The official

[43] Land Registration Fee Order, 1930, para. XII (7).
[44] Land Registration Rules, 1925, r. 288 (2).
[45] Land Registration Fee Order, 1930, para. XIII.
[46] Land Registration Rules, 1925, r. 313.
[47] *Ibid.* r. 292 (1).
[48] *Ibid.* r. 296.

search in question will not, of course, be the free official search which is available to proposing purchasers, lenders, and lessees.[49] Application for it should be made by letter, describing the nature of the search required,[50] and the fee of 5s.[51] must be paid. If an office copy is required, the application for it should be made on printed form A.44 [52] accompanied by the appropriate fees indicated on that form.

If, instead of ignoring the notice or consenting to the proposed inspection, the registered proprietor objects in writing to the application, inspection will not be allowed, and it is noteworthy that the objection may be an entirely arbitrary one and may be made without assigning a reason. In such an event the only course open to the applicant will be to apply to the High Court (or, where its jurisdiction extends, to the Court of Chancery of the County Palatine of Lancaster [53]) for an order for inspection. It is unlikely, however, where the relationship of rentowner and terre tenant exists, that unreasonable objections will be made.

(9) DISPOSITIONS OF AND AFFECTING REGISTERED RENTCHARGES

Transfer of Rentcharge

One of the lacunae touching rentcharges in the Land Registration Acts and Rules—and quite an important one—is derived from the failure of the parliamentary draftsman to envisage that the registered proprietor of a rentcharge might wish to sell it. It is true that rentcharges are embraced by the statutory definition of "land," [54] and that the registered proprietor of land is empowered to transfer it [55] by means of a simple transfer in form 19.[56] Yet it is a well-established principle of the general substantive law that the all-important benefit of the grantor's covenant to pay a rentcharge cannot run with the rentcharge at law so as to enable the rentowner for the time being to sue under it.[57] "Whatever may be the foundation of the rule, and whether it rests on the broader principle that (except as between lessor and lessee) no covenant

[49] Under the Land Registration Rules, 1930 and 1936.
[50] Land Registration Rules, 1925, r. 292.
[51] Land Registration Fee Order, 1930, r. XII (6) (*b*).
[52] Obtainable from any branch of H.M. Stationery Office.
[53] Land Registration Act, 1925, s. 112. As to "the court," see *ibid.* s. 138 (1) and the Land Registration Rules, 1956, r. 1.
[54] Land Registration Act, 1925, s. 3 (viii).
[55] *Ibid.* s. 18 (1).
[56] Land Registration Rules, 1925, r. 98; Sched., form 19.
[57] *Milnes* v. *Branch* (1816) 5 M. & S. 411; *Grant* v. *Edmondson* [1930] 2 Ch. 245, affirmed [1931] 1 Ch. 1, C.A.

can run with an incorporeal hereditament, or whether it rests on the narrower principle that a covenant to pay a rentcharge is a collateral covenant or a covenant in gross which does not touch or concern the rentcharge, or whether it rests on no principle and is merely arbitrary, I am of opinion that it is too firmly established to be disturbed by this court." [58] In consequence there must be an express assignment of the benefit of this covenant to each successive rentowner if he is to obtain that benefit and, as a simple transfer in form 19 contains no such provision, the necessary addition has been made in the precedent which has been provided.[59] The Chief Land Registrar will not decline to register a transfer containing such an addition to the statutory form.[60] Yet even when this has been done, these benefits will not be referred to on the property register of the title when the transfer is registered, because one effect of completing a transfer by registration is to confer the legal estate upon the transferee "together with all rights, privileges and appurtenances belonging and appurtenant thereto," [61] and it is not the practice of the Registry to indulge in tautology. Nevertheless, if the parties specially so desire and make application for the purpose when the transfer is lodged for registration, the Registry will add a note to the proprietorship register of the fact of the assignment of the benefit in question. This note is automatically removed when the registered proprietor's name is cancelled on a transfer or other disposition.

This remedy of suing on the covenant is to be distinguished from the remedy of an action in debt. The liability arises simply from the landowner's ownership of the land out of which the rentcharge issues [62] and, of course, a proprietor who is registered with an absolute title to freehold land has vested in him the legal estate in fee simple in possession.[63]

Ever since January 1, 1882,[64] there have been available to a rentowner for recovery of arrears of his rentcharge the three statutory remedies of distress, entry for perception, and demise to a trustee, so far as no contrary intention is expressed in the deed creating the rentcharge.[65] These obviously require no assignment. Nevertheless, if the remedies (whether by way of distress, re-entry, or otherwise) were expressly granted before 1882, it appears that

[58] *Per* Lawrence L.J. in *Grant* v. *Edmondson* (*supra*) at p. 26.
[59] See Form 20, p. 730, *post*.
[60] In pursuance of his powers conferred by the Land Registration Rules, 1925, r. 78. And see *ibid.* r. 74.
[61] Land Registration Act, 1925, s. 20 (1).
[62] *Thomas* v. *Sylvester & Ors.* (1873) L.R. 8 Q.B. 368.
[63] Land Registration Act, 1925, ss. 5, 20 (1), and 69 (1).
[64] Conveyancing and Law of Property Act, 1881, s. 1 (2).
[65] *Ibid.* s. 44; see now the Law of Property Act, 1925, s. 121.

they need to be assigned even now in order to pass them to the rentowner for the time being, unless they were granted to the original rentowner, his heirs and assigns. For that reason, reference to such an assignment may sometimes need to be made in the proprietorship register by means of a note which might take the following form:

Note: The transfer to the proprietor contains an assignment of the benefit of all covenants [powers and remedies] for recovering the registered rentcharge [*or as the case may be*].

Neither the existence of such a note nor the fact of registration with an absolute title guarantees that the covenants, powers and remedies are subsisting and enforceable. No such note will be made on first registration, for the same reasons that personal covenants are not then entered on the register.[66]

Transfer of Part

In connection with rentcharge titles, a transfer of part [67] may be used for two quite different kinds of dealings. In the first, it simply operates to transfer one or more (but not all) of a number of rentcharges which are collectively registered under a single title number. There is no difficulty about this and a precedent is provided.[68] In the second, it is used for a somewhat hazardous disposition, namely, the sale of part of a registered rentcharge. A precedent [69] has been prepared for this, too, but the risks inherent in this transaction, which have already been referred to in connection with first registration, may be recapitulated briefly. Although it "seems as firmly decided as anything can be" that a rentowner cannot divide the demand for what is due to him and be allowed to distrain for part of it on one part of the charged land and afterwards distrain for the residue of it on the remaining part,[70] that principle does not prevent the division of a rentcharge on a sale. Accordingly, a part of a rentcharge may be conveyed without the consent of the owner of the land subject thereto, so that thenceforth the owner of each part may distrain for his part of the rentcharge.[71] But it seems that a right of entry cannot similarly be divided, so that if it becomes determined as to a part of the land, it becomes determined also as to the remainder.[72]

[66] See Practice Notes nos. 1 and 21 of those on Registered Land Conveyancing prepared by the Joint Advisory Committee of the Law Society and H.M. Land Registry.
[67] Form 20 in the Schedule to the Land Registration Rules, 1925.
[68] See Form 21, p. 731, *post*.
[69] See Form 22, p. 732, *post*.
[70] *Owens* v. *Wynne and Jones* (1855) 4 E. & B. 579.
[71] *Colborne* v. *Wright* (1679) 2 Lev. 239; *Rivis* v. *Watson* (1839) 5 M. & W. 255, 266.
[72] *Dumpor's Case* (1603) 4 Co.Rep. 119b (Vol. 2, p. 558).

Completion of Transfer by Registration

The transfer (whether of the whole or part), which does not require the usual "Particulars Delivered" stamp,[73] should be lodged for registration by post with the following:

1. Printed application cover A.4 (or, in the case of a transfer of part, A.5).[74]

2. The transferor's rentcharge certificate. In the case of a transfer of part, the transferor's solicitor will prefer to deposit the certificate at the Registry himself so as to ensure that it is returned to him after completion of the registration.[75] Therefore, at completion he should give an undertaking to the transferee's solicitors to deposit the certificate within (say) three days and to inform the latter of the deposit number which should then be quoted on form A.5.

3. A fee under scale 4 on the consideration.[76]

If the title of the charged land is registered, so that the rentcharge is already noted as an incumbrance on the charges register of the title, the land certificate is *not* required in the Registry because the devolution of a noted (as opposed to a registered) incumbrance is never shown on the register.

Charge of Rentcharge

A rentcharge may, like corporeal land, be the subject of a legal mortgage or a charge by way of legal mortgage. When the title to a rentcharge is registered, it is suggested that the parties should use for a charge the short official form 45,[77] although it is open to them to use any form they like so long as the rentcharge is described by reference to the registered title number.[78] The charge should be lodged at the Registry with a certified copy of it,[79] the rentcharge certificate,[80] and a fee under scale 4 on the amount of the loan.[81] It is a convenience to everyone concerned if a printed application cover A.4 is used. On the charge being completed by registration,[82] a charge certificate, containing the original charge and the plan and entries relating to the rentcharge title is issued to the chargee, and the rentcharge certificate is retained in the

[73] Finance Act, 1931, s. 28 (3).
[74] These are obtainable from any branch of H.M. Stationery Office.
[75] See the Land Registration Act, 1925, s. 110 (6); Land Registration Rules, 1925, r. 269.
[76] Land Registration Fee Order, 1920, para. V (1).
[77] Land Registration Rules, 1925, r. 139; Sched., form 45. The form may be obtained from any branch of H.M. Stationery Office.
[78] Land Registration Act, 1925, s. 25 (2).
[79] Land Registration Rules, 1925, r. 139.
[80] Land Registration Act, 1925, s. 64 (1) (*a*).
[81] Land Registration Fee Order, 1930, para. V (2).
[82] Land Registration Act, 1925, s. 26.

Registry until the charge is cancelled.[83] From the moment of completion by registration, but not before,[84] the registered chargee possesses and, as and when the law so allows, may exercise, all the powers conferred by statute on the owner of a legal mortgage,[85] so long as those powers are not negatived or modified by the instrument of charge.[86] In particular, these powers include the important one of appointing a receiver of the rentcharge when the mortgage money has become due.[87]

The registered charge may be transferred[88] by a transfer in official form 54,[89] which should be lodged for registration with the rentcharge certificate,[90] and a fee of 1s. per £100 on the capital value of the interest transferred (maximum £2).[91]

When requisite[92] the charge should be discharged by the use of official form 53, signed by the proprietor of the charge[93] or, if the chargee is a corporation, sealed by it in accordance with the provisions of its articles of association or other constitution,[94] over a twopenny stamp.[95] The discharge should be lodged at the Registry by the rentowner's solicitor with the charge certificate (no fee is payable), when the rentcharge certificate will be issued to him.

Rentcharge Charged on Rentcharge

Before January 1, 1926, a rentcharge could not be created out of a rentcharge because it was not possible to distrain upon the latter.[96] On and after that date, however, a rentcharge may be granted, reserved, charged or created out of or on another rentcharge payable out of land.[97] If the annual sum or any part of it is unpaid for twenty-one days after the appointed time the rentowner has power (without prejudice to any prior interest or charge) to appoint a receiver,[98] and this power takes effect in

[83] *Ibid.* s. 65.
[84] *Lever Finance Ltd.* v. *Needleman's Trustee* [1956] Ch. 375; *Grace Rymer Investments, Ltd.* v. *Waite* [1958] Ch. 314; affirmed [1958] 3 W.L.R. 337.
[85] Land Registration Act, 1925, s. 34 (1). The powers are described in the Law of Property Act, 1925, ss. 99 to 101 and 103 to 110.
[86] Land Registration Rules, 1925, r. 140.
[87] Law of Property Act, 1925, s. 101 (1) (iii).
[88] Land Registration Act, 1925, s. 33.
[89] Land Registration Rules, 1925, r. 153; Sched., form 54.
[90] Land Registration Act, 1925, s. 64 (1) (*a*).
[91] Land Registration Fee Order, 1930, para. VI (4).
[92] Land Registration Act, 1925, s. 25 (3) (i).
[93] Land Registration Rules, 1925, r. 151; Sched., form 53.
[94] *Cf. Dartford Union Guardians* v. *Trickett & Sons* (1889) 59 L.T. 754, 759.
[95] *Cf. Firth* v. *Inland Revenue Commissioners* [1904] 2 K.B. 205 (decided in reference to the corresponding form 48 in the Rules of 1903). In the case of some corporations, such as building societies, no 2d. stamp is required.
[96] Co.Litt. 184b.
[97] Law of Property Act, 1925, s. 122 (1).
[98] *Ibid.* s. 122 (2).

substitution for the usual remedies that apply to the case where a rentcharge issues out of land,[99] and it is not subject to the rule against perpetuities.[1] The receiver's appointment, powers, remuneration and duties are governed by the provisions relating to a mortgagee who is entitled to exercise the statutory power of sale.[2] Although the creating of a rentcharge out of another (registered) rentcharge is an unusual transaction, it is occasionally carried out, so that a precedent has been provided.[3] Application for substantive registration of the new rentcharge must be made whether the property affected is within a compulsory or a non-compulsory area, because it is a disposition of registered land.[4] There should be lodged at the Registry by post:

(1) An application in form 1F (or, 1H, if the new rentowner is a corporation).[5]
(2) The deed creating the new rentcharge, which will be filed.
(3) A certified copy of it, which will be bound up in the new rentcharge certificate.
(4) The grantor's rentcharge certificate.[6]
(5) A fee under scale 1 on twenty times the annual value of the rentcharge.[7]

On completion of the registration a rentcharge certificate will be issued to the applicant and the existing rentcharge certificate will be sent to him also, unless contrary instructions are given in the panels provided on page 3 of form 1F (or 1H).

The charges register of the title to the charged rentcharge will contain the following (debit) entry:

	Title P. 00717 C. CHARGES REGISTER	Application No. and remarks
1.	The registered rentcharge is charged with a perpetual yearly rentcharge of £100. 0s. 0d. created by a Deed dated 29 February 1960 and made between (1) Benjamin Brizell and (2) Hubert Halsall.	Filed under P. 00898.

The property register of the new rentcharge title (the credit entry) will be in the following form:

[99] *Ibid.* s. 122 (3).
[1] *Ibid.* and see *ibid.* s. 121 (6).
[2] *Ibid.* s. 122 (2), and see *ibid.* ss. 101 (1) (iii), 109.
[3] See Form 23, p. 733, *post.*
[4] Land Registration Act, 1925, s. 19 (2). And see p. 226, *ante.*
[5] These forms may be obtained from any branch of H.M. Stationery Office.
[6] Land Registration Act, 1925, s. 64 (1) (*a*).
[7] Land Registration Fee Order, 1930, para. I; Fee Order Rule 11 (*a*).

A. PROPERTY REGISTER Title P. 00898

County or County Borough	Parish or Place
Blankshire	Stockham

A PERPETUAL YEARLY RENTCHARGE of £100. 0s. 0d. (registered on 3 March 1960) payable half-yearly on 25 March and 29 September created by a Deed dated 29 February 1960 and made between (1) Benjamin Brizell and (2) Hubert Halsall.

The registered rentcharge is charged upon and issues out of a PERPETUAL YEARLY RENTCHARGE of £150 0s. 0d. created by a Conveyance dated 15 October 1937 made between (1) Michael Morland (2) Christopher Cook which rentcharge is charged upon and issues out of the FREEHOLD LAND shown and edged with red on the plan of the above title filed at the Registry known as 20 to 80 (even nos.) Oldpool Street.

Note 1: Original deed dated 29 February 1960 filed: copy in certificate.

Note 2: The charged rentcharge is registered under P. 00717. The land charged is registered under P. 00099.

Demise of Rentcharge

The demise of a rentcharge, though an extremely rare transaction, is one which is recognised by law,[8] and there is nothing in the Land Registration Act or Rules to prevent the grant of a registered leasehold title in respect of it.[9] When the lease comprises corporeal land in addition to the rentcharge no special point arises, but when a rentcharge alone is demised it is probable that the "rent" reserved is not a true rent, so that in such a case the entry on the register of the leasehold title of the particulars of the lease will not refer to a "rent" but to an "annual sum."

When a registered rentcharge is demised, this is a disposition of registered land which must be completed by registration in order to be effective at law,[10] whether or not the land charged lies within a compulsory area. Completion by registration in this instance involves two processes, namely, first, substantive registration of the lessee's title, and secondly, entry of notice of the lease against the lessor's (that is, the rentowner's) registered title. If there is no substantive registration of the lessee's title he will be unable to pass a legal estate to his successors in title[11]: entry of notice is not enough. On the other hand, when application is made for substantive registration of the term (that is, an application for first registration), notice of the lease is automatically entered by the Registry against the lessor's title. The following documents should be lodged:

[8] See, *e.g.*, *Milnes & Ors.* v. *Branch* (1816) 5 Maule & S. 411.
[9] As to a good leasehold title, see the Land Registration Act, 1925, s. 10.
[10] See the Land Registration Act, 1925, s. 19 (2); *Woolwich Equitable Building Society* v. *Marshall* [1952] Ch. 1 at pp. 5, 6. *Cf. Lever Finance, Ltd.* v. *Needleman's Trustee* [1956] Ch. 376.
[11] *British Maritime Trust, Ltd.* v. *Upsons, Ltd.* [1931] W.N. 7.

(1) An application for first registration in form 3B (or, when the lessee is a corporation, 3E).[12]

(2) The lease. It does not require a "produced" stamp.[13]

(3) A certified copy of it.

(4) The lessor's rentcharge certificate.[14] It may, alternatively, be placed on deposit.[15]

(5) A fee under scale 3 on the rent under the lease, if it is a rack-rent[16]; otherwise a fee under scale 2 on the rent under the lease plus a fee under scale 1 on any premium paid.[17]

The entries on the property register of the good leasehold title will take the following form:

A. PROPERTY REGISTER Title P. 02154

County or County Borough	Parish
Blankshire	Blackdale

A leasehold interest (registered on 6 February 1960) in a perpetual yearly rentcharge of £1000 payable on the usual quarter days created by a Deed of Grant dated 20 December 1959 and made between (1) William Whitby (2) Sirol Shelley.

The said rentcharge is charged upon and issues out of the freehold land shown and edged with red on the plan of the above title filed at the Registry known as Wellstead's Factory, Liverchester Road.

Short Particulars of Lease Under Which The Rentcharge is Held

Date	*Parties*	*Term* *Years*	*From*	*Annual sum*
3.2.1960	(1) Sirol Shelley (2) Donald Doe	99	23.3.1960	£3500

Note 1: The lease comprises also other property.

Note 2: A copy of the Deed of Grant dated 20 December 1959 is filed under title P. 00167.

Note 3: The lease contains a prohibition against alienation without licence during the last seven years of the term and all estates, rights, interests, powers and remedies under the lease at any time arising upon or by reason of such alienation are excepted from the effect of registration.[18]

Note 4: Lessor's title registered under P. 01270.

Priorities: the Normal Rule

In the case of a registered rentcharge the register refers to all overriding rentcharges provided, of course, that they were

[12] These forms are obtainable from any branch of H.M. Stationery Office.
[13] Finance Act, 1931, s. 28 (3).
[14] Land Registration Act, 1925, s. 64 (1) (*a*).
[15] See p. 271, *ante*.
[16] Land Registration Fee Order, 1930, para. III.
[17] *Ibid.* para. II.
[18] For the reason for making this entry, see the Land Registration Act, 1925, s. 8 (2), and the Land Registration Rules, 1925, r. 45.

disclosed to the Registry at the time of first registration.[19] If the title to the land subject to the rentcharge was registered at the time of its creation the rentowner will know, from his inspection of the freehold title, whether or not the land was then subject to prior mortgages or charges. If the title to the land was then unregistered, he should have similar knowledge from his examination of the title to the land.

In the case of a rentcharge which, instead of being registered, is merely noted as an incumbrance against the title to the land subject thereto, its order in the entries in the charges register will normally indicate its priority in relation to other incumbrances because on first registration all incumbrances are entered in their proper order of priority and, thereafter, each application or instrument presented for registration is completed as of the day on which and of the priority in which it was delivered at the Registry unless that application or the instrument itself contains a contrary direction or inference.[20] In particular, registered charges rank according to the order of their entry on the register and not according to the date of their creation.[21]

Priority of Statutory Charges

But the normal rule that the subject-matter of the first entry on the register has precedence over that of the second, and so forth, is liable to be disturbed in the case of certain statutory charges which enjoy a special priority. Thus, to take a well-known example, when a local authority has acquired a charge for expenses incurred by it in the execution of works for rendering premises fit for human habitation together with interest at the authorised rate, it has power to acquire a charge giving it the powers and remedies of a legal mortgagee under a deed,[22] and under the general law this charge is a charge on the total ownership so that it takes priority over any other interest in the premises,[23] including a perpetual yearly rentcharge thereon, whether created by grant or by reservation.[24] It is not clear from the statute whether this charge is a land charge or a local land charge although, in other instances, no doubt exists as, for example, a statutory charge in favour of the London County Council for the

[19] See p. 106, *ante*.
[20] Land Registration Rules, 1925, r. 83 (2). *Cf.* r. 42 which deals with first registration.
[21] Land Registration Act, 1925, s. 29.
[22] Housing Act, 1957, s. 10; Housing (Rate of Interest) Amendment Order, 1934 (S.R. & O. 1934, No. 913), as amended by the Housing (Rate of Interest) Amendment Order, 1947 (S.R. & O. 1947, No. 445).
[23] *Paddington Borough Council* v. *Finucane* [1928] Ch. 567.
[24] *Bristol Corporation* v. *Virgin* [1928] 2 K.B. 622.

expenses of dealing with a dangerous structure,[25] which is a local land charge [26] (although, incidentally, it also happens to be a puisne mortgage).[27]

But whether such a charge (being a charge to secure money) happens to be a land charge or a local land charge, in registered conveyancing it cannot be realised by the chargee selling in exercise of his power of sale unless it is first registered as a registered charge.[28] The method of applying for substantive registration is scarcely germane to the present subject [29] but it should be noticed that when a local authority applies to register a charge of the kind under discussion, its solicitor should state in a covering letter that the charge has priority over other incumbrances by virtue of the specified provisions of a statute.[30] When priority is so claimed an entry is made in the register that the charge has priority under the statute referred to and that it does not (as between itself and other incumbrances of earlier date) rank according to the date of its creation or according to the order of entry upon the register.[31]

The certificates relating to all titles affected by such a charge ought to be lodged to enable the registration of the charge to be completed but obviously it will often prove difficult for a local authority to lay hands on the land certificate relating to the freehold interest and, perhaps, impossible for it to obtain the land certificate in respect of a leasehold interest or the rentcharge certificate in respect of a rentcharge on the premises. Therefore the Chief Land Registrar has sometimes to consider whether he has power to dispense with production of the certificate [32]: in such a case notice will be served by the Registry upon all registered owners having an interest affected by the charge, informing them of its existence and calling for the owner's certificate.

In the case of a noted rentcharge the entries in the register will show that the local authority's registered charge on the land has priority over the rentcharge. In the case of a registered rentcharge a note will be made in the property register giving short particulars of the charge. In either case the entries give warning that in the event of the local authority enforcing its charge by selling the land, the rentcharge will be overreached, although the rentowner will be entitled to any surplus proceeds of sale in the hands of the authority in priority to later chargees and the landowner himself.

[25] London Building Acts (Amendment) Act, 1939 (c. xcvii), s. 70.
[26] Land Charges Act, 1925, s. 15.
[27] *Ibid.* s. 10 (1), class C (i).
[28] Under the Land Registration Act, 1925, s. 26; see *ibid.* s. 59 (2), proviso.
[29] It is described in Curtis & Ruoff's *Registered Conveyancing* at pp. 560, 561.
[30] *Cf.* Land Registration Rules, 1925, r. 157 (1).
[31] *Ibid.* r. 157 (2).
[32] See *ibid.* r. 159, which refers to r. 131.

GIFTS TO NON-CHARITABLE BODIES

By E. O. Walford, ll.d.

Amongst other possible causes of the invalidity of gifts to bodies whether incorporated or otherwise are the misdescription of the body, its dissolution, or the fact that it is not a charitable body, and that either by the express terms of the gift or by necessary inference the gift must be construed as an endowment, and not simply as a gift to the members of the body in question at the date when the gift is due to take effect. There is also the possibility that the donor has purported to make a gift to a body which has no existence in law.

A Non-Existent Body

Such was the position in connection with the gift to the Oxford Group.[1] As Bennett J. observed in the course of his judgment: "Before one can find an association there must be some rules, either written or oral, by which those who are supposed to be members of it are tied together. . . . There must be some constitution." There was in fact a group of people who were endeavouring voluntarily to lead a spiritual quality of life; but there was no membership list, no badge was issued, nor was any subscription payable. The Oxford Group, as the movement was termed, had no rules or location. Accordingly the gift failed.

The religious nature of the activities of the so-called Group was not of a kind which, in the opinion of the learned judge, was for the promotion of religion within the purview of the relevant decisions, *i.e.*, the promotion of spiritual teaching and the maintenance of the doctrines on which it rests, and not merely a foundation or cause to which it can be related.[2]

Hence the gift to the Oxford Group could not derive support from the *cy-près* doctrine, there being no general charitable intention, the objects of the Group not being for the advancement or promotion of religion as recognised by judicial decisions.

Receipt Clause Ineffective

It is a common device, when a gift is being made to an unincorporated body or to an obviously non-charitable body, to

[1] *Re Thackrah* [1939] 2 All E.R. 4.
[2] *Cf. per* Hanworth M.R. in *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Commissioners* [1931] 2 K.B. 465, at p. 477.

state that the receipt of a certain officer shall be a sufficient discharge to the personal representatives. In fact, in *Re Thackrah*,[3] the gift was expressed to be made in favour of "the secretary or other proper officer (whose receipt shall be full and sufficient discharge) of the Oxford Group"; but as no legally recognisable body could be identified with the Oxford Group, that device was ineffective.

Gift to Individual Members

Suppose, however, that the gift is in favour of a body of persons bound together by rules, and therefore recognised by the law, as an unincorporated body, and that such body is not a charity in the legal sense. In such a case it has been the practice of some conveyancers to express any gift in favour of such a body as being "for the general purposes" of the body. In *Leahy* v. *Att.-Gen. of New South Wales*[4] Viscount Simonds, delivering the opinion of the Privy Council, stated that it was by disregarding those words and treating the gift as an absolute gift to the individual members of the body that the gift could be upheld. His Lordship referred to a number of decisions in which gifts to unincorporated bodies had been upheld on the ground that the gift was absolute and the members could demand that the gift be dealt with as they should think fit, there being no obligation to treat the gift as an endowment, and to preserve the capital.

The Effect of Rules

A gift "for the general purposes" of a particular body will not necessarily be effective, although that phrase is often used in the belief that it will avoid any presumption of an endowment the capital of which would have to be preserved. It may nevertheless appear that the rules of that body are such as to require that moneys given to it for its general purposes are to be invested or applied in a certain manner, and are not to be disposable as to both capital and income as the members, or the committee, may decide. In such cases, in the absence of any provision in the rules under which a gift could be made to the individual members beneficially, it would be difficult, if not impossible, to devise a formula which would validate a gift to such a body unless it was, in law, a charitable body. Moreover, it seems extremely unlikely that any donor would in fact desire to give money to the members which could be used by them for their own benefit and could *not*

[3] *Supra.*
[4] [1959] 2 All E.R. at p. 307.

lawfully be used for the purposes of the body of which they were members. In a case where the gift was to the trustees of a library, which was not to be broken up so long as there were at least ten members, it was held that the language of the rules of the society made it clear that the library was intended to be a perpetual institution, with the result that the gift was invalid.[5] The point has been taken in a very interesting article in this *Journal*[6] that the members had power to change the rules at the annual general meeting. It may be argued with force that the donor could not have contemplated that the effect of the gift would have been to cause the members to change the rules. Although the gift to a Masonic Lodge to build a temple, or a gift to the Corps of Commissionaires in London towards the purchase of barracks may be said to be a purpose trust, it can hardly be denied that such a gift is indirectly for the benefit of persons.[7]

It is generally stated that where there is no beneficiary there can be no trust, unless the trust is a charitable one. In *Re Dean*[8] the testator left a fund upon trust to apply the income in the maintenance of his horses and hounds for a period of fifty years, and the gift was held to be valid. It seems to be generally accepted that such a trust or a trust for the maintenance of (say) a single tomb, as distinct from all the graves in a churchyard, would have to be limited to a period of twenty-one years or otherwise brought within the perpetuity period if it is to be held to be valid today.

It is, however, difficult to see how a trust for the maintenance of animals can be said to have a human beneficiary, or indeed to be enforceable so long as such a trust is not considered to be charitable in law.

It is apprehended that a residuary beneficiary or the next-of-kin (as the case may be) could possibly claim the income or capital, as may be appropriate, in so far as a trust for the benefit of animals was not carried out by the trustees of the will. Similarly, in such circumstances if the gift were made *inter vivos* presumably there would be a resulting trust in the absence of any specific provision in the settlement in the event of the failure by the trustees to apply the money as directed.

The present writer desires to acknowledge the assistance which he has derived from the above-mentioned article by Mr. D. C. Potter[9]; but with respect he does not fully appreciate the difficulty

[5] *Carne* v. *Long* (1860) 2 De G.F. & J. 75.
[6] Vol. 13, pp. 418–425. See footnote (*m*) at p. 424.
[7] *Cf. Re Turkington* [1937] 4 All E.R. 501; *Re Clarke* [1901] 2 Ch. 110.
[8] (1889) 41 Ch.D. 552.
[9] Vol. 13 of this *Journal*.

which Mr. Potter has in accepting the proposition that apart from gifts to a charity or where there is a general charitable intention (in which case the Attorney-General may intervene), "there must be somebody in whose favour the court can decree performance," to quote Sir William Grant M.R. in *Morice* v. *Bishop of Durham*.[10] Again, in *Bowman* v. *Secular Society, Ltd.*,[11] Lord Parker said that "a trust to be valid must be for the benefit of individuals . . . or must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable" in the legal sense.

That proposition is subject to the qualification that "it is the duty of the King as *parens patriae* to protect property devoted to charitable uses. . . . On this foundation rests the right of the Attorney-General in such cases to obtain by information the interposition of a court of equity." [12]

Trust for the Benefit of Animals

What then is to be said of trusts for the benefit of animals which have been held to be valid notwithstanding the fact that no human being can *specifically* enforce such a trust.[13] It seems that these cases can be supported only because of the existence of residuary legatees or remaindermen who would be entitled to step in if the trust for the benefit of the animals were not carried out, in which event the legatees or remaindermen would claim the moneys which should have been used for the benefit of the animals.

A similar explanation may be given of the cases where trusts for preserving tombstones or monuments have been upheld. Thus, in the well-known case of *Re Chardon* [14] there was a gift to trustees of moneys to be invested and paid to a cemetery company during such period as they should keep a certain grave in good order, with a condition that if the grave were not kept in order the income was to go to the residuary beneficiaries. That decision has been subjected to a great deal of criticism and it cannot be said to rest upon a very sure foundation.[15]

On the other hand, there is no doubt as to the validity of a gift to a charity, A, with a gift over to another charity, B, if

[10] (1804) 9 Ves. 399.
[11] [1917] A.C. at p. 417.
[12] *Per* Eldon L.C. in *Att.-Gen.* v. *Brown* (1818) 1 Swan. 290.
[13] There is a substantial group of cases in which the trust is either for animals' graves or monuments, *e.g.*, *Pettingall* v. *Pettingall* (1842) 11 L.J.Ch. 176; *Mitford* v. *Reynolds* (1848) 16 Sim. 105; *Re Dean* (1889) 41 Ch.D. 552; *Pirbright* v. *Salwey* [1896] W.N. 86; and *Re Hooper* [1932] 1 Ch. 38.
[14] [1928] Ch. 464. This decision, though never overruled, has been severely criticised and is not a very reliable authority. *Re Tyler*, *infra*, is, however, a much safer decision on which to rely.
[15] *Cf. Re Davies* [1915] 1 Ch. 543.

charity A fails to perform a certain condition, such as the maintenance of a particular grave (or, presumably, the maintenance of animals or any other lawful purpose).[16]

In connection with such provisions there is, of course, an indirect means of enforcing the condition even if there is no human beneficiary who can enforce for his own benefit the actual performance of the immediate object (*e.g.*, the upkeep of a grave), because the ultimate beneficiary will most probably step in and claim the fund if it is established that the relevant condition is not being performed by the charity first named.

Thus, in *Pettingall* v. *Pettingall*,[17] where there was a trust for the upkeep and care of a mare, there were residuary legatees who were entitled to step in if the mare was not looked after.

What may be termed a mere purpose trust of a non-charitable nature occurred in *Re Thompson* [18] where there was a gift to a trustee for the promotion of fox hunting and the testator gave the residue of his estate to Trinity Hall, Cambridge. There, again, the sanction, if the trust money was not applied as directed, was a claim by the residuary beneficiary, and an order was made on the lines of that made in *Pettingall* v. *Pettingall*.[19]

To that extent non-charitable trusts for the furtherance of purposes or objects, as distinct from the benefit of individuals (if confined within the perpetuity period) may be said to be effective. There remains the case where the gift to a non-charitable body is of the whole estate or of the residue of the estate, so that there is no alternative beneficiary who could claim the trust fund if the " purpose " trust is not carried out. Again, the persons ultimately entitled to the trust fund may not be immediately ascertainable, or the purpose which the settlor or testator has in mind may not be very clearly defined, it being left to the discretion of the trustees, so that if any question arose on which the trustees wanted the guidance of the court, the position is too vague to enable the court to give directions. In all such cases the court is forced to hold that the trust is void.[20] The ruling in relation to such cases may perhaps be said to be an illustration of the fact that the testator cannot leave it to his executors or trustees to decide how his estate shall be dealt with, apart from charitable

[16] *Re Tyler* [1891] 3 Ch. 252, approved by the House of Lords in *Royal College of Surgeons* v. *National Provincial Bank* [1952] 1 All E.R. 984.
[17] (1842) 11 L.J.Ch. 176.
[18] [1934] Ch. 342.
[19] *Supra.*
[20] *Re Astor's Settlement Trusts* [1952] 1 All E.R. 1067.

objects. Thus, a direction that a fund shall be given to such persons or applied for such (non-charitable) purposes as the trustees shall think fit would be void.[21] It might, however, be different if the power were conferred only upon certain named trustees, as distinct from a general reference to the trustees of the will. We now proceed to illustrate that distinction.

Powers and Trusts

In the interesting article by Mr. D. C. Potter above mentioned [22] attention is drawn to the uncertainty of the dividing line between powers of appointment and discretionary trusts or purpose trusts. He instances *Re Park* [23] where there was a gift to trustees upon trust to pay the income to such person (other than herself) or persons or charitable institution(s) in such shares and proportions as X should direct from time to time, with a gift over on the death of X. That provision was held valid as a power. If the discretion had been vested generally in the executors of the testator without any time limit, the disposition would have been ineffective. The point is that whether the deed or will in question creates a general or special power the possible donees of the power must be ascertainable within the perpetuity period calculated from the date of the creation of the power.[24] Of course, in the case of a will the date of the creation of the power is the date of the testator's death. Although the *donees* of the power must be ascertainable as above stated, the objects of a general power of appointment need not be so limited by the power itself. It is enough if, when the power is exercised, it is so exercised as to conform with the perpetuity period calculated from the date of the exercise of the power. On the other hand, in the case of a special power, although the validity of the power is not affected if it purports to confer power to appoint to individuals *some* of whose interests may not vest within the perpetuity period, yet when an appointment is made under the power its validity must be tested by considering whether the interests must necessarily vest within the perpetuity period calculated from the date when the instrument creating the power took effect.[25] Moreover, if a power is to be valid it must be so framed that it can only be exercised by persons necessarily ascertainable within the limits of the perpetuity

21 *Harris* v. *Du Pasquier* (1872) 26 L.T. 689; *Buckle* v. *Bristow* (1864) 5 New Rep. 7; *Fowler* v. *Garlike* (1830) 1 Russ. & M. 232, cited in *Williams on Wills*, at p. 607.
22 (1949) 13 Conv.(N.S.) at p. 424.
23 [1932] 1 Ch. 580.
24 *Re Hargreaves* (1890) 43 Ch.D. 401.
25 *Re Vaux* [1938] 4 All E.R. 297.

rule (*per* Clauson L.J. in *Re Vaux*,[26] citing *Re Hargreaves*).[27] It will, however, be seen that although the power may not be expressly so framed as to ensure its exercise by persons ascertainable within the perpetuity period, it may be shown that by reason of the conditions governing the selection of the objects of the power the appointment must be made within the limits of the perpetuity period: *Re Vaux*.[28] In that case the power and the appointment would be valid: *ibid.* These rules are material in relation to any attempt to avoid the rule "that a man may not delegate his testamentary power," as Lord Simonds said in *Chichester Diocesan Fund* v. *Simpson*,[29] adding that there is a single exception, *i.e.*, that his executors shall determine what charitable objects shall benefit, so long as such objects only can be selected. His Lordship was not, of course, considering the efficacy of powers of appointment, but the following words of Lord Macmillan in the same case [30] and which are not limited to charitable objects, are applicable to all powers of appointment or selection, except general powers. "The only latitude permitted [to a testator] is that if he designates with sufficient precision a class of persons or objects to be benefited he may delegate to his trustees the selection of individual persons or objects within the defined class," and one might add, within the perpetuity period. His Lordship proceeded: "The class must not be described in terms so vague and indeterminate that the trustees are afforded no effective guidance as to the ambit of their power of selection," citing *Houston* v. *Burns*.[31]

It is true that where a person is given a general power of appointment no one can tell, until the appointment is made, whether it will be made in favour of individuals and if so what individuals, or in favour of charitable or non-charitable bodies, so that some qualification of Lord Macmillan's words would be necessary if they were applied to general powers. On the other hand, a power to select from amongst a class of persons or objects is not a general power, and a person contemplating gifts to particular non-charitable bodies is not normally willing to give a general power of appointment to his executors or other persons.

Conclusions

What useful information is to be derived from the decisions above mentioned and other relevant decisions? It is submitted that the answer is as follows:

[26] [1938] 4 All E.R. at p. 302.
[27] (1889) 43 Ch.D. 401.
[28] *Supra*, at p. 304.
[29] [1944] 2 All E.R. at p. 74.
[30] *Supra*, at pp. 62, 63.
[31] [1918] A.C. 337, *per* Viscount Haldane, at pp. 342, 343.

(1) Apart from the obvious necessity for care in the ascertainment of the precise name and address of any non-charitable body which the settlor or testator desires to benefit it is desirable to ascertain—

(a) Whether the testator or settlor does in fact wish to permit the expenditure of the capital at the complete discretion of the body in question, or whether he intends that the fund shall be invested and the income only applied. If the latter, he should be advised that the gift can be so controlled only within the perpetuity period.

(b) In any event to what persons or recognised charitable body the testator or settlor would wish the fund to go, if the fund is not devoted to the purpose which the client has in mind, it being made clear to the client that it is doubtful whether there would be any means of enforcing a provision for the endowment of a non-charitable body, apart from the sanction imposed by the ultimate gift to some other persons or bodies whose interest would tend to keep them watchful concerning the use to which the fund was being put.

(c) Whether the rules or regulations of the body in question permit the expenditure of the capital and income of the fund as the committee or other managing trustees may decide.[32]

(2) It is safer, when making a gift to an unincorporated and non-charitable body, to state that the fund shall be applicable as to both capital and income in such manner as the members of the body shall decide for their own benefit.[33] However, it is doubtful whether a person contemplating a gift to a society or body would really intend, as Viscount Simonds put it in *Leahy's* case,[34] that the individual members should be the beneficiaries. Accordingly, the form suggested in paragraph (5) below reflects the intention that the fund should be devoted to objects in which the society or other body is interested.

(3) A power in favour of the trustees of the will, as such trustees, to select bodies which are to take or share a fund or pecuniary legacies may avoid the gift owing to the perpetuity rule unless the power of selecting is confined to charitable bodies. The point is that (even apart from statutory provisions) powers conferred on trustees are deemed to be exercisable by their successors

[32] *Cf. Carne* v. *Long* (1860) 2 De G.F. & J. 75.
[33] *Cf. Leahy* v. *Att.-Gen. of New South Wales*, *supra*.
[34] *Supra*, at p. 310.

in office.[35] If, however, it is made clear that the persons who are to make the selection are named individuals, so that the perpetuity rule cannot be offended so far as concerns the date of exercise of the power, the gift will fail if those individuals have died before the testator or before making the selection.[36]

(4) It is always desirable that any legacy in favour of a body, incorporated or unincorporated, should contain a declaration that the receipt of any person purporting to act as treasurer of that body shall be a full and sufficient discharge to the executors or others responsible for paying the legacy to that body, and possibly some practitioners may prefer to provide that such executors or other persons shall not be liable for any loss or misappropriation resulting from such payment notwithstanding that an examination of the rules or regulations of that body would have disclosed the fact that the person purporting to give the receipt in question could not give a valid receipt for the legacy.

(5) No formula can cover a case in which there is a conflict between the terms of the gift and the objects of the non-charitable body for which it is intended, or where all moneys given to the body must under its constitution be treated as an endowment. The following form should however suffice where it can be lawfully applied.

> "I give to the —— Society [*or other body*] of —— in the County of —— for its general purposes the sum of £—— And I declare that the said sum shall be applicable by the said Society [*or other body*] as to both *capital and income* for such purposes as may be permitted by the constitution of the said Society either immediately or at such time or times and in such amounts as may be determined by the committee or other managing body of the said Society [*or other body*] and shall not be deemed to constitute an endowment Provided that nothing herein shall prohibit the investment of the said sum or of any part thereof which is not required for immediate expenditure"

A provision on the lines suggested in paragraph (4) above should be added.

(6) The need for precision in connection with the wording of any gift is obvious; but that point is illustrated by the very recent decision in *Re Endacott's Estate*.[37] There a testator had left the residue of his estate, amounting to about £20,000, to the parish

[35] *Re Smith* [1904] 1 Ch. 139.
[36] *Asten* v. *Asten* [1894] 3 Ch. 260.
[37] [1959] 3 W.L.R. 799; [1959] 3 All E.R. 562.

council " for the purpose of providing some useful memorial " to himself. It was urged that a parish council would be compelled by its constitution to use the money for charitable functions and activities, or alternatively, that the gift was, in effect, for the benefit of the local inhabitants of the parish; but the learned judge did not accept either of those contentions. It was also argued that the wording of the gift might be construed as conferring an absolute gift to the parish council and not as imposing any legal obligation concerning the application of the money. That argument also was rejected and the gift was held to be void.

It will have been noted that the gift was of residue and the remarks made in the earlier part of this article concerning the absence of any other beneficiary under the will apply. Whilst it is submitted that the decision was in accordance with the authorities, one may be permitted to wonder whether it would be desirable, if and when the law concerning charities is being reconsidered, that such a provision—clearly harmless and probably beneficial to the local inhabitants if carried into effect—should be avoided by purely technical rules.

Statutory Provisions

The provisions of the Charitable Trusts (Validation) Act, 1954, and of the Recreational Charities Act, 1958, have, of course, validated certain trusts; and associations within the Literary and Scientific Institutions Act, 1854, are not subject to the perpetuity rule.

THE MODERN LAW OF AGRICULTURAL HOLDINGS—IV

Dilapidations

By J. Muir Watt, m.a., Barrister-at-Law

This article deals with the landlord's remedies for dilapidations. This is a part of the law of agricultural holdings on which the rural practitioner is very likely to be called upon to advise. There was a time when dilapidations were taken more lightly by the landlord and his advisers than they are at the present day. As, however, the landlord's position has become more difficult, as the tendency of legislation has been to weaken his rights against the tenant, and as heavy taxation has eaten into his income, there has naturally been a stronger motive for considering more carefully whether the tenant has fulfilled his obligations under the tenancy. Few landlords nowadays can afford to be as lax in the matter of dilapidations as some have been in the past. Economic pressure has diminished the landlord's ability to indulge in the luxury of benevolence. The wind of change has been blowing in this direction for some years.

Meaning of agricultural dilapidations

The word "dilapidations" is used in a wide sense in this context. It includes not only buildings and other items of fixed equipment out of repair but also various transgressions in regard to the land itself which would not be immediately obvious to an uninstructed layman's eye. A layman could see without difficulty that the roof of a farm building was in a bad state of repair or that fences, gates or roads required attention. But what would he make of "irregularity of cropping"? Again, inspection of the farm would not tell him that the agricultural crime of "produce sold off" had taken place. Yet all these come under the head of "dilapidations." Such is the oddity of the English language that valuers use the verb "to dilapidate," not in its primary sense, but as meaning to charge the tenant with one or other of the types of agricultural misconduct which are comprised by the term "dilapidations."

In practice, dilapidations are dealt with under the following four sub-headings:

(1) Houses, cottages and buildings;

(2) Fences, gates, roads, ditches and drains;
(3) Foul land and irregularity of cropping;
(4) Produce sold off.

The meaning of dilapidations in the case of (1) and (2) above is self-evident. "Foul land," also, has a fairly obvious significance. It would cover, for example, fields which carry an unreasonable quantity of weeds, contrary to elementary rules of good husbandry. "Irregularity of cropping" refers to land which is left out of its proper rotation, *e.g.*, a deficiency in the acreage prepared for a corn crop, a deficiency of young seeds, an excess of land in roots, or, even in these days of chemical fertilisers and near-magic weed-killers, the growing of too many white straw crops in succession. "Produce sold off" refers to the selling of produce, such as hay, straw or roots, which the tenant should have left behind for use or consumption on the holding. The tenant's obligations in this respect must be read as modified by section 11 of the Agricultural Holdings Act, 1948. The selling-off of certain kinds of farm produce not only deprives the land of some mechanical and manurial value but deprives the tenant's successor of the customary privilege of taking it over on the spot, thus avoiding the trouble and extra expense of buying it from outside at the market price.

It has been rather implied in what has been said above that the landlord's claim for dilapidations is something which is settled at the end of the tenancy. This is, indeed, what normally happens. The outgoing tenant will usually have various compensation claims against the landlord; for improvements, for tenant-right matters, and possibly for disturbance. The landlord's claim for dilapidations will be in the nature of a counterclaim. It is, however, possible, as will be noted below, for the landlord to make certain types of claim against the tenant during the currency of the tenancy.

Origin of tenant's obligations

The landlord's right to claim dilapidations is correlative to the tenant's legal obligations. The question, therefore, arises as to the origin of the obligations, the breach of which gives rise to the landlord's claims. The origin of the tenant's duties must be sought in three sources: (1) Common law, (2) Contract, (3) Statute.

Tenant's common law obligations

A tenant of an agricultural holding has certain common law obligations, based partly on the doctrine of waste, partly on the doctrine of implied contract. In practice, these obligations are

not nowadays of much importance, since the landlord can usually rely on obligations derived from express contract or from statute. In theory, however, a claim based on waste could still be made, and this applies also to a limited extent to a claim based on implied contract, although the scope of the latter claim is greatly reduced as a result of the wide range of express repairing obligations incorporated in contracts of tenancy by section 6 of the Agricultural Holdings Act, 1948, and the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948.[1]

Liability for waste is founded on tort, not contract, and is thus not excluded by the existence of an express contractual provision covering the same subject-matter.[2] A saving for the landlord's remedy under the doctrine of waste is contained in section 101 of the 1948 Act. Unfortunately, the precise nature of a yearly tenant's obligations under the law of waste is not entirely clear. Tenants for terms of years and tenants from year to year are liable for voluntary waste. Tenants for terms of years are liable for permissive waste, but there is some uncertainty about the liability of tenants from year to year for permissive waste. The better opinion seems to be that they are liable for permissive waste, but that the liability has been limited, and has been defined in practice rather by reference to what is reasonable having regard to the nature of the tenancy than by reference to the doctrine of waste.[3] Thus their liability under the head of permissive waste seems to be co-extensive with their liability under the doctrine of implied contract mentioned below.

The old cases on voluntary waste include such acts as pulling down buildings, changing the course of husbandry in a fundamental manner, as by the conversion of permanent pasture to arable or arable to woodland, and sowing pernicious crops. Some of the old cases can have little or no possible application today, but it still seems to be technically an act of waste to convert permanent pasture to arable without contractual or statutory authority. Section 10 of the 1948 Act, which provides machinery for modifying the provisions of a contract of tenancy which require the maintenance of specified land, or a specified proportion of the holding, as permanent pasture, recognises that even in these days permanent pasture has a certain sanctity.[4]

[1] S.I. 1948, No. 184.

[2] *Kinlyside* v. *Thornton* (1776) 2 Wm.Bl. 1111; *Marker* v. *Kenrick* (1853) 13 C.B. 188.

[3] *Yellowly* v. *Gower* (1855) 11 Exch. 274. The view expressed in *Torriano* v. *Young* (1833) 6 C. & P. 8 that a tenant from year to year is not liable for permissive waste goes too far.

[4] There are difficulties about what "permanent pasture" means in law. See Jackson and Muir Watt, *Agricultural Holdings* (11th ed.), p. 294.

It would be a rare occurrence today for a lawyer to advise a landlord to bring an action against his tenant based on the tort of waste. In most cases some other remedy would be available and its use would be preferable. It is, however, conceivable that circumstances might arise in which resort to this action would be appropriate. It should be noted that it is a remedy which can only be enforced in the courts. The statutory procedure for arbitration, and the restriction in regard to enforcement at the end of the tenancy, have no application to it.[5]

The doctrine of implied contract suffers also from uncertainty. It has been said that a tenant from year to year is under an implied obligation to keep the premises wind and watertight and to make fair and tenantable repairs, but it is doubtful whether his implied obligation extends beyond a duty to use the premises in a tenant-like and husband-like manner.[6] This includes an obligation to cultivate the holding in a husband-like manner according to the custom of the country.[7] Cultivation according to the custom of the country must now, however, be read subject to the qualified right of freedom of cropping conferred by section 11 of the 1948 Act. As far as repairs are concerned, the obligation to act in a tenant-like manner does not involve a liability to do any substantial repairs or to make good the results of ordinary wear and tear. The tenant must, however, take proper care of the subject-matter of the letting and "must do the little jobs about the place that a reasonable tenant would do."[8] The implied contract to use the property in a tenant-like or husband-like manner is excluded in so far as there is an express contract covering the same ground. In view of the comprehensiveness of the express repairing obligations contained in the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948,[9] which are deemed to be incorporated in every contract of tenancy of an agricultural holding, except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other,[10] there seems to be little or no room for an implied contract so far as the maintenance of the fixed equipment of the holding is concerned. It seems, however, that in the absence of express cultivation covenants there may still be an implied common law covenant to cultivate in a husband-

[5] See p. 299, *post*.
[6] See *Wedd* v. *Porter* [1916] 2 K.B. 91; *Warren* v. *Keen* [1954] 1 Q.B. 15.
[7] See *Wedd* v. *Porter*, *supra*; *Williams* v. *Lewis* [1915] 3 K.B. 493.
[8] *Per* Denning L.J. in *Warren* v. *Keen* [1954] 1 K.B. 15, at 20. This referred to a weekly tenant; a yearly tenant's liability cannot be less.
[9] S.I. 1948, No. 184.
[10] s. 6 (1) of the 1948 Act.

like manner. It is true that the statutory rules of good husbandry set out in section 11 of the Agriculture Act, 1947, remain in existence and have a number of legal effects,[11] but there is no statutory provision which says that they are to be deemed to be part of the contract of tenancy of an agricultural holding. There is, therefore, still room for the implied common law covenant. In practice, of course, there are likely to be express covenants in the contract of tenancy dealing with cultivation and the rotation of crops, the presence of which will exclude the implied covenant.

Tenant's obligations under express contract

Any well-drawn tenancy agreement will include clauses dealing with repairs and cultivation. The repairing clauses will nowadays be drawn with an eye on the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948.[12] In some cases the landlord and tenant may be content to adopt them formally, although the same result would be achieved by omitting all reference to repairing obligations from the agreement, since the statutory clauses would be incorporated by force of section 6 of the 1948 Act. Care is required if it is desired to impose on the parties obligations which differ from those contained in the statutory clauses. It is possible to contract out of them, but if the contract fails to cover a point, either by imposing an obligation or by relieving from it,[13] the statutory liability on the point is automatically let in. Further, contracting out is controlled by a provision which enables either party to take to arbitration the terms of a written tenancy agreement which departs substantially from the statutory model, provided (and this is a condition precedent which must be fulfilled before the arbitrator assumes jurisdiction) the party has tried and failed to persuade the other party to vary the agreement in order to conform to that model. The arbitrator must consider whether the departure is justifiable when regard is had to the circumstances of the holding and of the landlord and the tenant. He must disregard the rent, since the question is not whether the contractual repairing provisions are appropriate in view of the rent, but whether they are appropriate in view of the holding and the parties' circumstances. The arbitrator may then vary the contractual terms as seems to him reasonable and just, and may make such consequential adjustment in the rent as appears equitable.[14]

[11] In particular, they are important for the operation of s. 57 (1) of the 1948 Act. See below.
[12] S.I. 1948, No. 184.
[13] See *Burden* v. *Hannaford* [1956] 1 Q.B. 142.
[14] 1948 Act, ss. 6, 7.

The statutory clauses represent a not unreasonable division of repairing responsibilities and they should be accepted unless there are strong reasons to depart from them. There may be exceptional cases where it would be justifiable to place full repairing liability on the tenant. Minor variations of the statutory clauses are not, however, recommended. The draftsman who is setting out to vary the statutory clauses should first read carefully the case of *Burden* v. *Hannaford*.[15] Certain difficulties and possible ambiguities in the statutory clauses have come to light in the course of practice since 1948 (*e.g.*, questions relating to the exact division of responsibility in regard to "water mains" and "water supplies") and it is probable that they will be revised by a new statutory instrument in due course.

Statutory basis of liability

The landlord has a statutory basis of claim against the tenant under section 57 (1) of the 1948 Act. The position here is somewhat curious. The statutory claim under section 57 (1) is based on the "non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry." This wording suggests that such "responsibilities" have some independent sanction and until 1958 this was the case. The Agriculture Act, 1958, however, dismantled the state-administered apparatus of sanctions contained in Part II of the Agriculture Act, 1947. Sections 10 (rules of good estate management) and 11 (rules of good husbandry) of Part II of the 1947 Act were, however, left standing, as definitions of good estate management and good husbandry respectively, but without any state sanctions. So far as section 57 (1) of the 1948 Act is concerned, what it says in effect is that, apart from any contractual claim which he may have, the landlord will have a statutory claim for dilapidations if the holding suffers damage as a result of the tenant's failure to observe a good husbandry code which is embodied in a statutory definition. The statutory claim under section 57 (1) is considered in more detail later.

Arrangements in regard to dilapidations between the landlord, the outgoer and the incomer

The outgoing tenant's various possible claims for compensation, *e.g.*, for improvements and tenant-right matters, are claims against the landlord and no one else. Similarly, the landlord's claim for dilapidations is against the outgoer and no one else. The position

[15] [1956] 1 Q.B. 142.

in practice, however, is a little complicated by the fact that there are commonly agreements between the landlord and the incoming tenant relating to the outgoer's claim and to the dilapidations. The exact nature of these agreements will differ according to whether or not the standard of repairing obligations is to be the same in the new tenancy as it was in the old.

If the standard of repair is to be the same in the new agreement as in the old, the arrangements may be as follows. The incoming tenant will agree to pay to the landlord the amount payable by the landlord to the outgoing tenant, other than any sums due in respect of compensation for damage by game or compensation for disturbance, without deducting therefrom any amount payable by the outgoing tenant to the landlord in respect of dilapidations. The landlord will agree to pay to the incomer the amount received from the outgoer in respect of dilapidations and the incomer will agree to expend this amount towards carrying out his obligations under his contract of tenancy. The process, therefore, is that—

(a) the landlord pays the outgoer the amount of his valuation and receives from him the amount due in respect of dilapidations;
(b) the incomer repays to the landlord without deduction the amount paid in respect of the outgoer's valuation;
(c) the landlord pays over to the incomer the amount received from the outgoer for dilapidations;
(d) the incomer thus receives in advance compensation for the expenditure required to remedy dilapidations which were not due to any default of his;
(e) as the incomer has been paid the amount necessary to bring the holding up to the condition required by the terms of the tenancy, it is fair and reasonable that the repairing obligations of the tenancy should thenceforth be enforced strictly against him.

If it is provided that the standard of repair is to be more severe under the new agreement than under the old, the landlord may agree to pay to the incomer more than the landlord receives from the outgoer by way of dilapidations. If the standard under the new agreement is less onerous than under the old, it may be provided that only part of the sum received by the landlord from the outgoer is to be handed over to the incomer.

Other variations are possible. It may, for example, be provided that the landlord is to retain such portion of the dilapidations money as relates to the farmhouse, cottages and other buildings, and himself expend this portion on the necessary repairs, the

incomer receiving the balance of the dilapidations money. Again, it may be provided that the landlord is to retain the whole of the dilapidations money and spend it on the necessary repairs.

Different arrangements are necessary if the landlord has been in possession himself as an owner-occupier before the grant of the tenancy. In such a case it is sometimes provided that the tenant is to pay the landlord the same amount of compensation as if the landlord were an outgoing tenant who has been holding under the terms of tenancy just granted, less the amount which the landlord would have been liable to pay in respect of dilapidations as an outgoing tenant under the same terms. Under such an arrangement the tenant receives an allowance in respect of the extent to which the condition of the holding at the outset of his tenancy is below the standard required by the repairing obligations which he has assumed. This is an alternative which is sometimes considered to be preferable to the charging of a lower rent.

The landlord's remedies for dilapidations

The landlord has a number of remedies at his disposal if dilapidations have arisen as a result of the tenant's failure to observe his obligations. Thus the landlord may (1) use the procedure of section 24 (2) (*c*) or (*d*) of the 1948 Act to give the tenant a notice to quit which excludes security of tenure, (2) apply to the Agricultural Land Tribunal under section 25 for consent to a notice to quit, (3) bring an action for damages in the courts during the tenancy, (4) apply to the courts for an injunction, (5) apply to the courts for the forfeiture of the tenancy, (6) claim compensation under section 57 (1) at the termination of the tenancy, (7) claim compensation under section 57 (3) at the termination of the tenancy, (8) claim compensation under section 58 at such termination. It is not intended to convey the impression that the landlord will have a choice of all these remedies in every case. He certainly will not, but these are all possible remedies which the landlord's advisers should consider in the light of the particular circumstances of the case. It is now proposed to consider these remedies in greater detail.

(1) *Dilapidations as a ground for excluding section* 24 (1)

The landlord may decide to rely on the tenant's defaults as a ground for serving a notice to quit under section 24 (2) (*c*) or (*d*), thus excluding the tenant's right to serve a counter-notice under section 24 (1) of the 1948 Act. Section 24 (2) (*c*) will be appropriate where the tenant's transgressions consist of some form of bad husbandry, such as seriously foul land, neglected pasture,

errors in the scheme of farming adopted for the particular holding in question, and so on. A certificate of bad husbandry will not, however, be granted by the Agricultural Land Tribunal for minor faults. The tenant's shortcomings in husbandry will need to be fairly serious to assure the landlord of success in his application.

The procedure in relation to section 24 (2) (*d*) has already been considered in an earlier article.[16] Here it is only proposed to draw attention to its use as a means of getting rid of a tenant who has broken his repairing covenants. The National Farmers' Union has recently made the point that this procedure may be used oppressively. The preliminary notice may specify a long list of items of disrepair alleged to be due to breaches by the tenant of his obligations. The tenant may not agree that all the items are his responsibility, but he places himself in jeopardy if he fails to remedy every single item. There is no machinery provided for challenging the preliminary notice. The tenant may demand arbitration after receiving the notice to quit, based on alleged non-compliance with the preliminary notice, but by that time he has burnt his boats. If the arbitration goes against him even as to one item,[17] provided it does not come within the category of *de minimis non curat lex*, he has lost his security of tenure. In practice, therefore, tenants may decide to comply with schedules of dilapidations attached to the preliminary notice even if they do not agree that certain of the items listed are their responsibility. It may be that this state of affairs requires the attention of the legislature, but this article is not the place to discuss an issue which is controversial.

(2) *Application to the Agricultural Land Tribunal for consent to notice to quit*

An alternative procedure, where the tenant's dilapidations consist of bad husbandry, is to apply to the Agricultural Land Tribunal for consent to a notice to quit under section 25 (1) (*a*), either before the notice is served or after receipt of a counter-notice from the tenant. In order to succeed it is not sufficient for the landlord to prove that the tenant has been guilty of bad husbandry. The paragraph envisages a *comparison* between the present régime under the present tenant and the proposed régime if the tenancy is terminated, but without regard to any land save that to which the notice to quit relates.[18] It has sometimes been found in the past, when the decisions were given by county

[16] See *ante*, pp. 32–35.
[17] See *Edmunds* v. *Woolacott* (1959) 109 L.J. 204 (C.C.) (more fully reported in the *Journal of the Chartered Land Agents' Society* for March 1959, at p. 113).
[18] See *ante*, p. 135.

agricultural executive committees, that it was easier for a landlord to secure a favourable decision under section 25 than to secure a certificate of bad husbandry. This may not, however, be so under the new procedure of direct applications to the Tribunal.

(3) *Action for damages in the courts*

It was established in the case of *Kent* v. *Conniff* [19] that the landlord may, despite an apparent difficulty caused by the provisions of sections 57 (3) (*a*), 65 (1) and 70 (1) when read together, bring an action for damages in the courts during the currency of the tenanacy for breaches of contract, and that such an action may include both claims for dilapidations to buildings or other fixed equipment and claims for breaches affecting the farm land itself. This procedure may be advisable in some cases. Indeed, there may be cases where a cause of action which arises during the tenancy is no longer in existence on the tenant's quitting the holding at the end of the tenancy.

(4) *Injunction*

There may be cases where the appropriate course is to apply to the courts for an injunction, although the circumstances in which a landlord is likely to pursue this remedy will now be rare. The remedy of injunction cannot be invoked in order to enforce positively a covenant to repair. It might, however, be granted to prevent the threatened commission of waste. To obtain such an injunction it would be necessary to show that the waste would cause substantial injury to the reversion. An injunction might also be granted against the threat to commit that form of dilapidations which consists of " selling-off " produce such as hay or manure which should be retained for use and consumption on the holding.[20] A strong case would, it is hardly necessary to say, be required to justify the issue of an injunction on this account. Section 11 (2) (*a*) of the 1948 Act refers to the issue of an injunction to restrain the tenant from exercising his statutory rights of disposal of produce and freedom of cropping in such a manner as to injure or deteriorate the holding.

(5) *Forfeiture*

It is sometimes assumed that the remedy of forfeiture has been abrogated by law so far as tenancies of agricultural holdings are concerned. This is not so, but the chances of succeeding in an

[19] [1953] 1 Q.B. 361.
[20] See *Chapman* v. *Smith* [1907] 2 Ch. 97.

action for forfeiture are not, perhaps, very great. It is still desirable to incorporate a forfeiture clause in agricultural tenancy agreements, and it is noteworthy that the First Schedule to the 1948 Act includes among the matters for which provision is to be made under section 5 in a written tenancy agreement " a power for the landlord to re-enter on the holding in the event of the tenant not performing his obligations under the agreement." It is certainly open to a landlord, who has fulfilled the statutory conditions under the Law of Property Act, 1925, to seek to forfeit the tenancy for breach of obligations, if the tenancy incorporates a forfeiture clause, but forfeiture is a discretionary remedy, the tenant is entitled to claim relief, and in the climate of the elaborate safeguards provided for tenants by the present-day agricultural holdings code he would be a bold adviser who would feel confident of the landlord's success unless he had an overwhelming case.[21]

(6) *Statutory claim for dilapidations under section* 57 (1)

Section 57 (1) of the 1948 Act gives the landlord a statutory right to recover compensation from the tenant, when the latter quits the holding on the termination of the tenancy, in respect of the dilapidation or deterioration of, or damage to, any part of the holding, or anything in or on the holding, caused by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry.[22] This would cover such specific defaults by the tenant as the failure to apply sufficient fertilisers to land from which successive hay crops have been taken, or allowing pasture land to develop into rough herbage with an abundance of weeds and moss.[23] It also includes damage caused by such neglect as failure to maintain and repair specified fences, hedges and ditches.[24] Although the landlord's claim under section 57 (1) is statutory and not contractual, it has been held by the Court of Appeal that in determining such a claim the arbitrator is bound to take into account (1) the terms of the contract of tenancy, (2) the terms of any other agreement affecting the holding, so far as material, and (3) the provisions of the Agricultural (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948,[25] in so far as they are incorporated in the contract of tenancy.[26] The

21 The landlord failed (but on facts not law) to secure a forfeiture in *Kent* v. *Conniff* [1953] 1 Q.B. 361. See remarks on forfeiture by Morris L.J. at 375.

22 See p. 293, *ante*.

23 *Evans* v. *Jones* [1955] 2 Q.B. 58.

24 *Ibid.* See also *Barrow Green Estate Co.* v. *Exors. of Walker, decd.* [1954] 1 W.L.R. 231.

25 S.I. 1948, No. 184.

26 On incorporation, see *Burden* v. *Hannaford* [1956] 1 Q.B. 142.

court rejected an argument that, as the landlord was relying on the statutory basis of claim, no regard should be paid to any contractual arrangement, such as a provision in the contract of tenancy that the landlord would repair the fixed equipment before the tenant entered on the holding. It is clear from sections 10 (3) and 11 (3) of the 1947 Act, that the tenant's statutory good husbandry responsibilities in relation to maintenance and repair may be affected by contract, and the terms of the contract may in turn be affected by the Regulations. The measure of compensation under section 57 (1) is the cost of making good. This may differ from the measure applicable to section 57 (3) or to a common law action for damages.

(7) *The contractual claim under section* 57 (3)

Section 57 (3) provides that, notwithstanding anything in the Act, the landlord may, in lieu of claiming compensation under section 57 (1), claim compensation in respect of matters specified therein under and in accordance with a written contract of tenancy. As already mentioned, it was held in the case of *Kent* v. *Conniff* [27] that section 57 (3) does not preclude a landlord from bringing a common law action for damages during the tenancy. If, however, the landlord *elects* to pursue his claim under section 57 (3), there are certain conditions and restrictions. These are as follows:

(a) There must be a written contract of tenancy. If the tenancy is purely oral, the claim cannot be framed under section 57 (3). (The landlord in such a case could claim under section 57 (1), or, during the currency of the tenancy, bring a common law action for damages.) If, however, there is a written contract, the landlord is entitled to rely on repairing obligations which are not actually set out in the contract itself but which are incorporated therein by virtue of section 6 of the Act and the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948.[28]

(b) A contractual claim under section 57 (3), like the statutory claim under section 57 (1), may be pursued only on the tenant's quitting the holding on the termination of the tenancy.[29] This is subject to one exception, mentioned in section 7 (1) of the Act, where the landlord is allowed during the tenancy to bring a claim for accrued dilapidations on the transfer of liability for the repair of fixed

[27] [1953] 1 Q.B. 361. See p. 297, *ante*.
[28] S.I. 1948, No. 184.
[29] s. 57 (3) (*a*).

equipment to him from the tenant by virtue of section 5 or section 6.

(c) Compensation cannot be claimed in respect of any one agricultural holding both on the contractual basis of section 57 (3) and the statutory basis of section 57 (1).[30] The object of this restriction is to prevent the landlord from having the best of both worlds, by relying on section 57 (3) so far as it is advantageous to him and then falling back on section 57 (1) for the balance. The landlord is bound to make up his mind which basis to select, although he may legitimately frame his notice of intention to claim in the alternative and defer his actual choice until the arbitration.[31] This, again, is subject to the exception of a section 7 (1) claim, which, as mentioned above, may be brought during the tenancy. It would be unreasonable to prevent a landlord who had brought such a claim on a contractual basis during the tenancy from electing to rely on the statutory basis at the end of the tenancy.

(d) The landlord's contractual claim, *if pursued under section 57 (3)*, must be determined by arbitration under the 1948 Act, and not by an action in the courts. This is the result of section 70 (1). At the risk of wearisome reiteration, the reader is reminded that *Kent* v. *Conniff*[32] established that if the landlord has a cause of action during the tenancy he may pursue it in the courts and need not wait for arbitration proceedings under section 57 (3) at the end of the tenancy.

(e) A contractual claim under section 57 (3) can be made only "in respect of matters specified" in section 57 (1). The exact meaning of this is open to some doubt. Morris L.J. in *Kent* v. *Conniff*[33] thought that it covers any dilapidation, deterioration or damage to any part of the holding or anything in or on it, but a narrower interpretation is that it only covers any such dilapidation, deterioration or damage which is caused by bad husbandry. It may be that the point is of academic interest only, since a contractual claim, arising on or out of the termination of the tenancy in respect of matters which (on the narrower interpretation) are not specified in section 57 (1), would, in any case, have to be determined by arbitration as a result of section 70 (1).

[30] s. 57 (3) (*b*).
[31] *Boyd* v. *Wilton* [1957] 2 Q.B 277.
[32] [1953] 1 Q.B. 361.
[33] *Ibid.* at 378,

RELEVANCE OF "MODEL CLAUSES" TO BOTH STATUTORY AND CONTRACTUAL CLAIMS

It is important for the practitioner to note that the repairing liabilities set out in the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948,[34] are relevant to the statutory claim under section 57 (1), the contractual claim under section 57 (3), and to actions at common law. As these repairing terms are, when the qualifying condition is fulfilled, deemed to be incorporated in the contract of tenancy, their relevance to the contractual claim under section 57 (3) and to common law actions based on contract is obvious. Their relevance to the statutory claim under section 57 (1) may not, at first sight, be quite so obvious. It is due to their impact on the tenant's good husbandry responsibilities through the interaction of sections 10 (3) and 11 (3) of the Agriculture Act, 1947. The tenant's good husbandry responsibilities in relation to the maintenance and repair of fixed equipment include responsibilities which he has assumed by contract, and, therefore, responsibilities which are incorporated in the contract by virtue of the Regulations. The landlord remains liable under the rules of good estate management for any maintenance or repair of fixed equipment not shifted to the tenant by a written tenancy agreement or the Regulations. The Court of Appeal in *Barrow Green Estate Co.* v. *Exors. of Walker, decd.*,[35] seemed to find some difficulty in the fact that, although section 10 (3) refers to an agreement, section 11 (3) does not. It will be seen, however, that when section 10 (3) and section 11 (3) are read together they dovetail perfectly. If both had referred to an agreement the position where neither party is liable under an agreement would have been left in doubt. As it is, the owner has a residual responsibility in respect of obligations not shifted to the tenant by agreement.

(8) *Claim for general deterioration under section 58*

There is an additional compensation provision in section 58. Section 58 provides that, in so far as the compensation payable for specific dilapidations under section 57 (1) or section 57 (3) does not compensate him for the reduction in the value of the holding, due either to the matters mentioned in section 57 (1) or otherwise to the tenant's bad husbandry, the landlord may recover additional compensation. The further amount thus recoverable under section 58 is the amount, so far as not recoverable under section 57

[34] S.I. 1948, No. 184.
[35] [1954] 1 W.L.R. 231.

(1) or section 57 (3), of the decrease in the value of the holding as a holding, having regard to its character and situation, and the average requirements of tenants reasonably skilled in husbandry. Section 58 is at first sight a little unexpected and the justification for the additional compensation which it provides may not be immediately apparent. It would, however, cover a case where the cost of making good, in relation to a section 57 (1) claim, might be held to be limited to the cost of re-seeding, but the farm would have to be let for some years at a reduced rent while a mismanaged pasture was being re-established. Section 58 was judicially considered in *Evans* v. *Jones*,[36] where Evershed M.R. said:

> "As I understand it, section 58 covers, among others, the case where, as a result of the specific failures by the tenant (which failures are the subject of claims made under section 57) the landlord can also prove a general depreciation of his farm as a whole; that claim being, however, subject to the limitation that he must always, in the kind of case where there is also a claim under section 57, bring into account anything he recovers under section 57, so that he does not in any case recover twice over."

It is noteworthy that Evershed M.R. referred to "the kind of case where there is also a claim under section 57," thus making it clear that in his view a section 58 claim could be pursued independently, without any claim being made under section 57. If, however, it is made in conjunction with a section 57 claim, account must be taken of the section 57 compensation in order to avoid duplication.

Whether the section 58 claim is made independently or as ancillary to a section 57 claim, it is essential to observe that it is a condition precedent to a section 58 claim that the landlord shall, not later than one month *before* the termination of the tenancy, give notice in writing to the tenant of his intention to claim compensation under the section. Failure to do so is fatal. This preliminary notice may not absolve the landlord from the need to give the usual notice of intention to claim under section 70 (2) (the point is arguable) before the expiration of two months from the termination of the tenancy, and the safer course is undoubtedly to give both notices. A preliminary notice is not required for a section 57 claim, but, of course, the section 70 (2) notice must be given.

[36] [1955] 2 Q.B. 58, at 64.

Measure of compensation: section 18 (1) of the Landlord and Tenant Act, 1927

The measure of compensation for the statutory claim under section 57 (1) is the cost, as at the date of the tenant's quitting the holding, of making good the dilapidation, deterioration or damage.[37] This measure is not applied to the contractual claim under section 57 (3), which is governed by the ordinary rules applicable to actions for breach of contract. These include section 18 (1) of the Landlord and Tenant Act, 1927, which, in so far (but in so far only) as the claim is for breach of a repairing covenant, sets, as an upper limit to the compensation recoverable, the diminution in the value of the reversion. This upper limit, which applies to section 57 (3) claims relating to disrepair and to ordinary actions at common law on the repairing covenants, has no application at all to section 57 (1) claims, which are non-contractual. Further, there may be some section 57 (3) claims which are not in respect of breaches of contract "to leave or put premises in repair," but in respect of some other kind of injury to the holding, and in such cases section 18 (1) of the 1927 Act will have no application. Even where section 18 (1) does apply, the cost of making good may afford prima facie evidence of the damage to the reversion.[38] It should be noted that if section 18 (1) applies, and the landlord is proposing at the end of the tenancy to convert the land to a non-agricultural use which will involve the demolition of the farmhouse and other buildings, he may be prevented from recovering compensation for the tenant's failure to repair them, owing to the provision in the second half of section 18 (1).[39]

It may obviously be on occasion in the landlord's interest, particularly where his claim relates to the repair of one expensive item, to bring it under section 57 (1) rather than section 57 (3) and so recover the cost of making good without any limitation.

Liability under "model clauses" to "put" in repair

It was decided in *Evans* v. *Jones*[40] that the liability placed on the tenant by the statutory repairing clauses,[41] "to repair and to keep and leave clean and in good tenantable repair, order and condition," is not merely to keep and leave in *as* good repair and condition as at the beginning of the tenancy, and on the other hand cannot be said without any qualification to be "to put" in

37 s. 57 (2).
38 See *Jones* v. *Herxheimer* [1950] 2 K.B. 106.
39 See *Salisbury* v. *Gilmore* [1942] 2 K.B. 38; *Cunliffe* v. *Goodman* [1950] 2 K.B. 237.
40 [1955] 2 Q.B. 58.
41 S.I. 1948, No. 184.

repair. The true test, as expressed by Evershed M.R.,[42] is whether as a matter of good husbandry and common sense, and having regard to the age and character of any particular item, its condition at the beginning of the tenancy, and the length of the tenancy, the tenant did in fact perform the obligations set out in the clauses as an agricultural tenant to keep and leave the fixed equipment in question in good tenantable repair, order and condition.[43]

Miscellaneous points

Dilapidations before assignment of the reversion

There is one difference between a claim under section 57 (1) and a claim under section 57 (3) which might be material if the reversion has been assigned during the tenancy. It is a common law rule that the assignee of the reversion has no right of action for breaches of covenants, although running with the land, committed before the assignment, unless the right to claim has been specifically assigned to him as a chose in action. This complication, due to lack of privity of contract between the assignee and the tenant, does not arise in the case of a section 57 (1) claim, which is non-contractual in origin. This point may in some cases be worthy of consideration by the landlord's advisers, although where the breach is a continuing one it may not be of much importance.

Effect of covenant in "model clauses" to leave fixtures in repair

The tenant's right to remove fixtures may be excluded by an express covenant which requires him to yield or deliver up or leave at the end of the tenancy in good repair not merely landlord's fixtures but also tenant's fixtures. Whether the covenant extends to tenant's fixtures depends on its wording and there is a good deal of case law on the subject.[44] This prompts the rather startling question whether the wording of paragraph 5 of the Schedule to the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948,[45] could possibly be construed as having this effect. The material words are as follows:

> "To repair and to keep and leave clean and in good tenantable repair, order and condition, the farmhouse, cottages and farm buildings, together with all fixtures and fittings, drains, sewers, water supplies, pumps, fences, live and dead hedges,

[42] *Ibid.* at p. 66.
[43] *Martyn* v. *Williams* (1857) 1 H. & N. 817; *Johnson* v. *St. Peter's, Hereford, Churchwardens* (1836) 4 A. & E. 520; *Wedd* v. *Porter* [1916] 2 K.B. 91; *Ellis* v. *Torrington* [1920] 1 K.B. 399.
[44] See *Woodfall* (25th ed.), pp. 828–830.
[45] S.I. 1948, No. 184.

gates, field walls, posts, stiles, bridges, culverts, ponds, water courses, ditches, roads and yards in and upon the holding, or which during the tenancy may be erected or provided thereon. . . ."

It would be an odd result if this wording had the effect of preventing the tenant from removing fixtures erected by him during the tenancy and thus frustrating the operation of section 13 of the 1948 Act. The answer probably is that the court would construe the provision as applying only to landlord's fixtures, the use of the word " provided " assisting this construction, since its natural meaning is " provided by the landlord."

Leasehold Property (Repairs) Act, 1938

The Leasehold Property (Repairs) Act, 1938, which restricts the enforcement of repairing covenants during the currency of certain leases by requiring the landlord to obtain the leave of the court, and the scope of which was considerably extended by section 51 of the Landlord and Tenant Act, 1954, does not apply where the property comprised in the tenancy is an agricultural holding.[46]

Consecutive tenancies: protection for landlord : section 59

Section 59, which is the landlord's counterpart of the tenant's sections 44 and 54, prevents the landlord's claim from being defeated on the technical ground that it is made on the termination of a tenancy subsequent to that during which the default occurred, in a case where the tenant remains in occupation during two or more tenancies. This disposes of the difficulty which would otherwise arise where, for example, the parties have agreed on such substantial modifications of the original terms that a new tenancy is created.

[46] 1954 Act, s. 51 (1) (*c*).

GIFTS *VIRTUTE OFFICII* TO DONEES OF A CHARITABLE CHARACTER

By V. T. H. Delany, m.a., ll.d., Barrister-at-Law

All the leading textbooks on the law of charities [1] agree that a gift to a person who shall from time to time fill an office of a charitable nature is in itself charitable, whereas a gift to the particular individual who happens to be the holder of the office when it takes effect is not so. Authority for this proposition is to be found in a line of cases commencing in the middle of the eighteenth century,[2] and it can now be said to be established beyond question. Thus, a bequest to the minister of a particular church for the time being [3] or to a minister and his successors [4] are charitable bequests.

Where the gift is one to the office bearer *simpliciter*, no difficulty arises. Where, however, the donor designates as his trustee an office bearer, and then goes on to give some indication of the purposes of his trust, the matter becomes one of considerable complexity. Thus, it may be that the trust is designated in ambiguous language, in which case the court may be able to resolve the ambiguity by examining the character and qualifications of the office bearer [5]; or, in the alternative, he may have named his trustee and then gone on to indicate purposes, in unambiguous terms, which may or may not be charitable. Here, it seems, the rule is that the court will not allow the character of the trustee to confine the gift to objects of a charitable nature only.

It has been pointed out [6] that cases concerning this type "have been only too often before the courts," and it is to be feared that a detailed examination of all the authorities tends to increase the

[1] Tudor, 4th ed., p. 53; Tyssen, 2nd ed., pp. 72–78.

[2] *Lloyd* v. *Spillet* (1734) 3 P.Wms. 344; (1740) Atk. 148; *Att.-Gen.* v. *Cock* (1751) 2 Ves.Sen. 273; *Att.-Gen.* v. *Sparks* (1753) Amb. 200; *Att.-Gen.* v. *Power* (1809) 1 B. & B. 145; *Att.-Gen.* v. *Molland* (1832) You. 562; *Att.-Gen.* v. *Gladstone* (1842) 13 Sim. 7; *Thornber* v. *Wilson* (1858) 4 Drew. 350; *Robb* v. *Dorrien* (1877) I.R. 11 C.L. 293; *Gibson* v. *R.C.B.* (1881) 9 L.R.Ir. 1; *Re Ingleby* (1890) 34 S.J. 676; *Re Braham* (1892) 36 S.J. 712; *Re Brown* [1898] 1 I.R. 423; *Re Charlesworth* (1910) 26 T.L.R. 214; *Corcoran* v. *O'Kane* [1913] 1 I.R. 1; *Re Barclay* [1929] 2 Ch. 173; *Hannon* v. *Keane* (1938) 72 Ir.L.T.R. 113; *Re Deighton* (1952) 86 Ir.L.T.R. 127.

[3] *Att.-Gen.* v. *Sparks*, *supra*.

[4] *Thornber* v. *Wilson*, *supra*.

[5] *Re Kenny* (1907) 97 L.T. 130; *Re Rees* [1920] 2 Ch. 59; *Re Friends' Free School* [1909] 2 Ch. 675.

[6] *Re Rumball* [1956] Ch. 105, at 121, *per* Jenkins L.J.

perplexity, for many of them turn on the finest shades of meaning in the language used, and not a few of them appear to be inconsistent one with the other. More recently, however, it would seem that a considerable degree of clarity has been introduced into this branch of the law of charities by the Court of Appeal in the case of *Re Rumball, Sherlock* v. *Allan.*[7]

In *Re Rumball,* a testator disposed of his residuary estate " to the bishop for the time being of the diocese of the Windward Islands to be used by him as he thinks fit in his diocese." At first instance, Danckwerts J. had held that these words created a valid charitable trust in favour of the bishop, and from this decision the next-of-kin of the testator appealed. The appeal was founded on the contention that while a gift in favour of the bishop without any words superadded would be charitable, on the ground that a trust appropriate to his office would be implied, as would a gift to him " as he thinks fit," on the ground that here, again, there is nothing more than an unfettered discretion (appropriate to the charitable office) conferred, it was otherwise so far as the added words " in his diocese " were concerned. These words, it was said, were not unqualified, and caused the case to fall into that category of decisions in which the words used by the donor have extended the possible ambit of the objects to which the gift could be applied beyond the range of legal charity.

For the respondent, it was argued that the words " in his diocese " were not words which would have the effect of enlarging the objects of application, but were words which did nothing more than impose a territorial limitation; they made it clear that the charitable work to be carried out by the bishop *virtute officii* was to be carried out within the diocese, and did nothing to extend the range of activities in which he could engage beyond those which were charitable. In such a case, where the words did nothing more than confer a discretion or impose a limitation, they did not affect the charitable character of the office bearer.

The Court of Appeal, consisting of Lord Evershed M.R., Jenkins and Parker L.JJ., were of the unanimous opinion that the decision of Danckwerts J. was correct and that the appeal must be dismissed. The Master of the Rolls took the view that although the distinctions between the cases in " this notoriously difficult field " were extremely fine, it is, nevertheless, possible to extract principles from them, and to apply these principles in determining on which side of the line a particular fact situation will fall. In *Rumball's* case, he thought, the gift did constitute a valid charitable trust.

[7] [1956] Ch. 105.

It appeared to Lord Evershed M.R. that the conflicting arguments advanced on either side might be summarised in this way: on the one hand, it was submitted, once it is apparent from the surrounding circumstances that the donee of a gift is a trustee, in the sense that he is an office bearer, and the trusts upon which he holds are exclusively those appropriate to his office, then, if the words superadded to the gift to him are completely unqualified, the trusts upon which the gift is to be held must be limited to the scope of the office. To do otherwise would be to concede that the words were capable of being construed so as to confer beneficial enjoyment on the donee, when, in fact, he took as a trustee. But where the words are not entirely unqualified, this dilemma does not arise, and it becomes possible to construe them in the ordinary way; then, if they embrace non-charitable purposes, the gift must fail as a charity. On this argument, the gift to the bishop must be void, for the uses to which he might, as a trustee, seek to apply it within his diocese might not all be charitable ones.

The argument put forward in support of the alternative principle of construction, on the other hand, involved the following propositions: The real question is whether (i) upon the construction of the language used, the words following the gift are intended to show merely that, within the scope of the trusts appropriate to his office, the trustee is to have some discretion, or whether (ii) by the superadded words the donor is himself attempting to define the trusts. Should the latter be the correct construction, then (and only then) does it become necessary to construe the words, since it is only in this case that the donor is seeking to define the objects of the trust, over and above its impliedly charitable nature conferred on it by the character of its trustee. Accordingly, if the words following the gift to the office bearer are absolutely general, the former construction is the correct one, *i.e.*, that the words are merely intended to indicate that, within the scope of the trusts implicit in the gift to the charitable office bearer, the discretion is vested in him; to hold otherwise would be to enable the office bearer, by means of the superadded words, to enjoy the gift beneficially.

The Master of the Rolls accepted this second argument as being correct. He did so on two separate grounds, each of which is of interest. In the first place, he thought, to apply the first test would mean that *any* qualification of any kind following a gift to an office bearer would be fatal to its validity as a charity and would never be construed as a permitted exercise of his discretion. Such an "automatic rule of thumb," he considered, would be an undesirable one on which to found a principle of construction, for

the vice of such qualifying words lay not in their being construed as a limitation, but rather in their operating as an extension beyond the range of legal charity. Secondly, said Lord Evershed M.R., if the first argument were to be followed, it would involve the further proposition that a gift, for example, " to the Bishop of X to be used by him for such purposes as he shall in his absolute discretion think fit, other than for the repair of the cathedral," would fail, because of the final words, although the effect of those words is merely to limit the general purposes and to exclude one only of the trusts implicit in the office of a bishop; it is not to substitute some new and different trusts which the donor himself defines.

In agreeing with the reasoning of the Master of the Rolls, Jenkins L.J. adverted to his judgment in the earlier case of *Re Spensley's Will Trusts*,[8] in which he had stated the principles in equivalent terms, and went on to say: " The question in the present case, therefore, is whether the words ' to be used by him as he thinks fit in his diocese ' are merely superadded words conferring wide powers of disposition, or are words imposing trusts which according to their terms are not, exclusively or necessarily, of a charitable nature. In other words, has the testator here left the purposes of the gift to be implied from the charitable character of the bishop's office, and merely added a provision to the effect that the bishop is to have full discretion in the application of the fund for these purposes, or has he defined the trusts on which the property is to be held in terms capable of including objects which are not charitable? "

Jenkins L.J. had no difficulty in concluding that the question should be answered in the former sense, since the testator had not defined his trusts, but had merely given the bishop an absolute discretion as to its application, with a mere territorial limitation on that discretion. A gift to the bishop for the time being, without more, would have been charitable; the addition of the words " to be used by him as he thinks fit " merely directed the bishop that he was to settle the mode of application within his ecclesiastical purposes; and the words " in his diocese " were an expression which would have been implied in any event.

Principles deducible from the Cases

Rumball's case has done much to elucidate the difficulties inherent in the decisions, and it now becomes possible to advance the following tentative rules as being applicable to gifts of this kind:

[8] [1954] Ch. 233.

1. A gift to a person occupying an office of a charitable nature for the time being, or a gift to an officer "and his successors," without more, will take effect as a valid charitable gift for the purposes of the office in question.[9] Since the character of the office bearer is such as to make it inevitable that he will employ the gift for purposes strictly charitable, the courts will content themselves with looking to that character.[10]

2. A gift to an office bearer of a charitable nature, followed by superadded words which do no more than confer on him a complete discretion or impose upon him some specific limitation within the scope of his office, is a valid charitable gift. Thus, in the leading case of *Re Garrard*,[11] a gift to the vicar and churchwardens for the time being of the parish of K, "to be applied by them in such manner as they shall in their sole discretion think fit," was held to be valid. As Joyce J. put it, these words merely directed that "the particular mode of application within the charitable purposes of the legacy is to be settled by those individuals, or rather that there is power given by them to do it. . . ." Expressions which have been given a similar construction have been: to a clergyman for "his work in the parish"[12]; ". . . for such objects as they may think fit"[13]; "for such purposes in the diocese as he wishes"[14]; ". . . in such manner in all respects as he shall think fit"[15]; and "for any purposes to which they think proper to apply it."[16]

3. A gift to an office bearer of a charitable nature, followed by words of limitation or restriction, which either make it clear that the objects of the gift are confined within the scope of legal charity, or preclude the donee from applying the gift with respect to one or more of his functions, is a charitable gift. Thus, gifts for "religious purposes"[17]; "charitable or religious purposes"[18]; "for such objects connected with the church as he shall think

[9] Cases cited in note 2, *supra*.

[10] *Re White* [1893] 2 Ch. 41; *Re Delany* [1902] 2 Ch. 642; *Re Schoales* [1930] 2 Ch. 75; *Re Barnes* [1930] 2 Ch. 80n.; *Re Ray's Will Trusts* [1936] Ch. 520; *Re Howley* [1940] I.R. 109.

[11] [1907] 1 Ch. 382. *Contra*, *Donnellan* v. *O'Neill* (1871) I.R. 5 Eq. 525.

[12] *Re Simson* [1946] Ch. 299; *Re Moroney* (1939) 39 S.R.(N.S.W.) 249.

[13] *Re Norman* [1947] Ch. 349. *Cf. Re Flinn* [1948] Ch. 241 (". . . as he shall in his absolute discretion think fit": charitable).

[14] *Halpin* v. *Hannon* (1948) 82 Ir.L.T.R. 74. *Cf. Re Beddy*, unreported, [1956] Ch. at 120 ("to use for such purposes in the diocese as he may choose": void); and see *Copinger* v. *Crehane* (1877) I.R. 11 Eq. 429; *Blount* v. *Viditz* [1895] 1 I.R. 42.

[15] *Re Ward* [1941] Ch. 308; *Re Cohn* [1952] 3 D.L.R. 833.

[16] *Re Hurley* (1900) 17 T.L.R. 115. *Cf. Cunningham* v. *Talbot* [1932] 3 D.L.R. 665; *Re Green* [1942] V.L.R. 210.

[17] *Arnott* v. *Arnott* (*No. 2*) [1906] 1 I.R. 127.

[18] *Rea* v. *Crozier* [1911] 1 I.R. 289; *Rickerby* v. *Nicholson* [1912] 1 I.R. 343.

fit" [19]; to the General of the Salvation Army for "corps purposes" [20]; to a vicar and churchwardens of a parish, requesting them to "especially bear in mind the requirements of the children in the said parish," and inhibiting them from using the fund "in connection with the furtherance of overseas missions" [21]; "for the benefit of the church and parish, but preferably for the support of the church school . . ." [22]; and "for diocesan purposes generally." [23]

4. Where the donor names his trustees and then proceeds to indicate the purpose of his gift in unambiguous terms, and the language used by him is wide enough to include purposes which would not be charitable in law, then notwithstanding the charitable character of his trustee, the gift will fail, for the court will not look to the character of the trustee in order to cut down those purposes. So, in *Re Davidson*,[24] a gift to the Archbishop of W. for the time being "to be divided amongst such bodies as he shall in his absolute discretion think fit," was held to be void. Farwell L.J. put the law in this way: "It was argued . . . that, inasmuch as the gift is to the Roman Catholic Archbishop of Westminster for the time being, that involved a gift not to an individual but to an office, an office which was a religious office, and therefore it was prima facie charitable. . . . But to my mind the argument fails in its initial stages, because the gift is not to the Archbishop for the time being for the religious purposes of his archdiocese, but it is for what is actually specified immediately afterwards. . . ."

The argument that the Archbishop could, in fact, apply the gift to ecclesiastical purposes alone, did not affect the issue for, as Cozens-Hardy M.R. said, citing the views of Grant M.R. in *Morice* v. *Bishop of Durham*,[25] "The question is not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it."

In *Dunne* v. *Byrne*,[26] Lord Macnaghten explained the rule by saying that "it is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee."

[19] *Re Bain* [1930] 1 Ch. 224. *Cf. St. Andrews-Wesley Church* v. *Toronto General Trusts Corporation* [1948] 4 D.L.R. 241.
[20] *Re Lawler* (1914) 31 T.L.R. 102.
[21] *Re Eastes* [1948] Ch. 257.
[22] *Re Norton's Will Trusts* [1948] 2 All E.R. 842.
[23] *Re MacGregor* (1932) 32 S.R.(N.S.W.) 483.
[24] [1909] 1 Ch. 567. *Cf. Doe* v. *Copestake* (1805) 6 East 328; *Aston* v. *Wood* (1868) L.R. 6 Eq. 419; *Re Freeman* [1908] 1 Ch. 720.
[25] (1805) 10 Ves. 522; *Att.-Gen. for New Zealand* v. *Brown* [1917] A.C. 393.
[26] [1912] A.C. 407, 410.

In accordance with this principle, a gift to be applied "amongst such parochial institutions or purposes as he shall select"[27]; "for work connected with the Roman Catholic Church in the said Archdiocese"[28]; "for helping to carry on the work of the Church"[29]; and "to His Holiness . . . the Pope . . . to use and apply at his sole and absolute discretion in the carrying out of the sacred office,"[30] have all been held to be void for uncertainty.

All these cases seem to turn on the distinction, taken by Lord Evershed M.R. in *Re Rumball*,[31] between words of limitation or definition, and words of enlargement. This is clear from the decision of the House of Lords in *Farley* v. *Westminster Bank*,[32] where it was held that bequests to the vicars and churchwardens of two parishes "for parish work" were not charitable. In the Court of Appeal,[33] Farwell J. had construed the words "parish work" as including what might be described as both the ecclesiastical and the social duties of the church—activities which the vicar and churchwardens might promote for the good of the parishioners, but which might not be charitable in the strict sense of that term. By adding these words, therefore, the testator was indicating the trusts on which the vicar and churchwardens were to hold the fund. The words were, to use the language of Lord Atkin,[34] "plainly enlarging words . . . they were used for the very purpose of defining what the testatrix meant as the purpose for which the money was to be applied," and since they could include non-charitable purposes, they rendered the gift void as a charity.

In the later case of *Re Simson*,[35] Romer J., in holding that the expression "to be used for his work in the parish" were restricting and not enlarging words, was able to distinguish *Farley's* case on that ground alone, for, as has been pointed out,[36] there is ample authority for the proposition that a gift "for the parish" is charitable.[37]

The decision of the Court of Appeal in *Re Spensley's Will*

[27] *Re Stratton* [1931] 1 Ch. 197.
[28] *Re Davies* (1932) 49 T.L.R. 5.
[29] *Re Jackson* [1930] 2 Ch. 389.
[30] *Re Moore* [1919] 1 I.R. 316. *Cf. Munster and Leinster Bank, Ltd.* v. *Att.-Gen.* [1940] I.R. 19; *McNamee* v. *Mansfield* [1945] I.R. 13; *Re Delaney Estate* (1957) 10 D.L.R. (2d) 213 ("for such purposes connected with the Roman Catholic Church . . . as he may select": void).
[31] [1956] Ch. 105, 114–116.
[32] [1939] A.C. 430.
[33] *Sub nom. Re Ashton* [1938] Ch. 482, 503.
[34] [1939] A.C. 430, 435. *Cf. Londonderry Church House, etc.* v. *I. R. C.* [1946] N.I. 178; *I. R. C.* v. *Baddeley* [1955] A.C. 572.
[35] [1946] Ch. 299.
[36] G. W. Keeton, *The Law of Trusts*, 7th ed., p. 159.
[37] *West* v. *Knight* (1669) Cas. in Ch. 134; *Re Garrard* [1907] 1 Ch. 382; *Re Norton's Will Trusts* [1948] 2 All E.R. 842.

Trusts[38] seems to have involved similar reasoning, for there was a gift to the National Trust—a charity with certain defined purposes—but upon trusts which did not fall within the charitable purposes for which the National Trust had been constituted.

5. Finally, it must be borne in mind that gifts *virtute officii* to donees of a charitable character are subject to the overriding principle, confirmed by the House of Lords,[39] that it must not be possible for the donee to devote the gift or any part of it to non-charitable objects. If the purposes are limited to charitable purposes, then it is immaterial that the donee is given a complete discretion; in the same way, if the donee is himself the bearer of a charitable office, then, as has been seen, the question of discretion is not material. The difficulty arises where the donee is not entirely charitable in character.

This would seem to have been the cause of non-exemption from taxation in the case of *Oxford Group* v. *I. R. C.*,[40] which came before the Court of Appeal in 1949. There, the memorandum of association of the Oxford Group, a company limited by guarantee, set out, *inter alia*, the following objects of the company: " (A) The advancement of the Christian religion, and, in particular, by the means and in accordance with the principles of the Oxford Group Movement. . . . (B) The maintenance, support, development and assistance of the Movement in every way. . . . (C) . . . To establish and support or aid in the establishment and support of any charitable or benevolent associations or institutions . . . in any way connected with the purposes of the association. . . ." Tucker L.J. took the view that the generality of clause (B) of the memorandum permitted the company to engage in purely secular activities in maintaining this religious movement, and so the movement itself could not be said to have been formed for charitable purposes. Moreover, Cohen L.J. thought that clause (C) was wide enough to permit the company to engage in activities which were not purely religious, and that this was fatal to a favourable finding on the question of charity, on the analogy of cases such as *Dunne* v. *Byrne*[41] and *Farley* v. *Westminster Bank, Ltd.*[42]

[38] [1954] Ch. 233.
[39] *Chichester Diocesan Fund and Board of Finance (Inc.)* v. *Simpson* [1944] A.C. 341.
[40] [1949] 2 All E.R. 537.
[41] [1912] A.C. 407.
[42] [1939] A.C. 430.

SALE BY THE EXECUTOR OF A TENANT FOR LIFE OF SETTLED LAND

By Sir Lancelot Elphinstone, Barrister-at-Law

In two articles published in *The Conveyancer*[1] I considered this subject at length. My views were, in substance, as follows:

(1) The executor of a tenant for life of settled land has no power to sell the land except for raising estate duty or money secured on the land by an equitable charge, the reason being that by sections 7 and 8 of the Settled Land Act the executor holds the land on trust to convey it to the person next entitled, subject only to the executor's being satisfied that provision will be made for payment of any unpaid estate duty.

(2) There is no " purpose of administration " applicable to the trust estate in settled land held by the executor, the reason being that the testator's beneficial interests in the settled land cease on his death and therefore do not devolve on his executor, and the death duties payable in respect of the settled land on the death of the tenant for life are not a liability of his estate. I thought that this view was confirmed by section 8 (3) of the Settled Land Act whereby, where the settlement is created by will, the obligation imposed on the settlor's executor to convey the settled land to the tenant for life is expressed to be subject to the executor's powers for purposes of administration, while the similar obligation of the executor of a tenant for life is expressed to be subject only to provision being made for payment of death duties, no mention being made of purposes of administration. And I referred to the decision of Parker J. in *Re Crunden and Meux's Contract*,[2] that the executor of a sole surviving trustee of leaseholds got no additional powers under section 30 of the Conveyancing Act, 1881, beyond those which the deceased trustee had.

(3) That a sale by the executor of a tenant for life for an unauthorised purpose, such as acceding to a request by the next tenant for life that the land should be sold although no capital money was required, would be a breach of trust, for which the executor would be liable.

(4) That the purchaser, having actual notice that the sale was for an unauthorised purpose, would not get a good title, actual

[1] (1959) 23 Conv.(N.S.) pp. 360–369; (1960) 24 Conv.(N.S.) pp. 43–46.
[2] [1909] 1 Ch. 690.

notice being more than mere surmise or suspicion, but not excluding knowledge of facts from which the irregularity of the sale could reasonably be inferred.[3]

(5) That a sale by the executor of a tenant for life can seldom be justified, it being usually preferable for the sale to be made by the next tenant for life after assent.

(6) That a purchaser should not accept a title from the executor of a tenant for life unless the purpose of the sale is disclosed and expressed in the conveyance.

The *Law Times* strongly criticises my views.[4] A legal journalist is always handicapped by having no one to express the other side, and the articles are welcomed. But as, after full consideration, I see no reason to alter my views, I feel I ought to give my reasons at length.

I am not certain whether the *Law Times* accepts or denies my major premise, that a sale (not being for raising capital money) in response to the request of the next tenant for life would be a breach of trust. The *Law Times* states: "The English are, with rare exceptions, an essentially reasonable people, and practitioners, having grasped in outline what they consider to be the general principles underlying the Property Acts of 1925, have proceeded successfully to apply them, or what they thought they were, without any frequent reference to the actual wording of the Act." All that can be said as to this is that a conveyancer who advises on the effect of the Settled Land Act without reading the relevant sections and is subsequently sued for negligence, will well deserve his fate.

The *Law Times* then states: "Where Sir Lancelot Elphinstone's article raises disquieting doubts is in his suggestion that the executor of a tenant for life may not confer on a purchaser a good title." Here I must state definitely that I have never suggested that a sale by an executor for raising death duties, or other capital money would not confer a good title on the purchaser. What I did say and still say is that a sale by the executor for an unauthorised purpose would be a breach of trust, but that the purchaser would be protected unless he had actual notice of the irregularity.

The *Law Times* quotes at length my submission that the executor of a tenant for life has no power to sell the settled land for purposes of administration, but omits the paragraphs in my article referring to the absence of the words "purposes of administration" in section 8 (3) (*b*) of the Settled Land Act,[5] and the decisions on the effect of section 30 of the Conveyancing Act, 1881. The *Law*

[3] *Per* Eve J. in *Wise* v. *Whitburn* [1924] 1 Ch. 464, 470.
[4] 229 L.T. pp. 32 and 237 in two unsigned articles entitled "The Conveyancer."
[5] In fact I referred to s. 7 without mentioning s. 8 (3). But the meaning of the paragraph is clear.

Times also omits to refer to my reasons for thinking that section 36 (8) of the Administration Act does not apply to a trust estate in settled land.[6]

The *Law Times* then quotes my words: "It follows that a sale by the executor of a tenant for life can seldom be justified and it is actually preferable for a sale to be made after assent to the person entitled."

The *Law Times* then states that my opinion is diametrically opposed to the opinion expressed in *Wolstenholme & Cherry*[7] that the personal representatives should, "if expedient, raise money to pay off portions and other capital money (including death duties) before making an assent." This may be sound advice in the case of large estates when the new tenant for life may not wish to be troubled with the details of the numerous sales which are often required, and it is unlikely that the amount raised on any sale would exceed the amount of the capital money required. But in the case which now often occurs where the value of the property proposed to be sold largely exceeds the amount of the duty, the position is different. No doubt the executor could sell the entire property if a sale of part only would depreciate the value of the remainder. But then why not raise the duty by mortgage? That, it is submitted, is a question which should be decided by the next tenant for life after assent; for a mere verbal or written consent would not bind the remaindermen.

The *Law Times* also cites *Emmet on Title*[8] as being opposed to my opinion. But this is not so. The passage quoted states that the primary duty of the executor, subject to the payment of death duties, is to pass the legal estate to the next person entitled. In the 13th edition the passage continued: "If the persons next entitled wish to have the land sold, it is customary for the general personal representatives of the tenant for life to make title and a purchaser from them is not concerned to inquire why they are selling. Nevertheless, if there is any doubt as to whether the persons beneficially entitled agree to the sale, then it is advisable for the personal representatives not to sell, unless it is necessary in order to raise death duties, but to transfer the land to the persons entitled and to leave them to sell if they wish." The *Law Times* adds that it does not appear that the editor of the 14th edition of *Emmet* suggests that it is customary for the general personal representatives to sell. It thus appears that *Emmet*

[6] See *ante*, p. 45.
[7] 12th ed., p. 918.
[8] 13th ed., vol. 2, p. 1130.

endorses my view, and neither *Emmet* nor *Wolstenholme & Cherry* suggests that an executor could sell merely to meet the wishes of the tenant for life.

The main concern of the *Law Times* appears to be the protection of the purchaser. However, on that question we appear to agree that the purchaser will be protected unless he has actual notice that the sale was a breach of trust. The only difference between us is that the *Law Times* considers that the protection arises under section 110 (3) of the Settled Land Act as being a sale for the purposes of administration, while I base it on section 13 of the Trustee Act. But the meaning and effect are the same.

In its first article the *Law Times* submitted that a sale by the executor of a tenant for life "for good reason, bad reason or no reason at all confers a good title on a purchaser." But in the second article it appears to be conceded that the purchaser would lose his protection by actual notice.

I have already stated my reasons for thinking that there is no purpose of administration applicable to the executor's trust estate in settled land. In its second article the *Law Times* counters this by stating (at p. 338) that "not infrequently a tenant for life has a general testamentary power of appointment over the settled property on his death and in such a case the settled land would be assets for the payment of his debts." Surely, this is a slip. The settled land would become assets for the payment of debts only if the testator exercised the power (Administration of Estates Act, s. 32 (1)), and then only after the land had ceased to be settled land by assent and discharge of the Settled Land Act trustees: see Settled Land Act, ss. 3, 17 (1) and (3) and 110 (5).

The *Law Times* then concludes that I am "wrong in considering that the position of an executor of a tenant for life is different from that of any other executor." And it is apparently on this ground that the *Law Times* advises that should a purchaser ask under what statutory power and for what purpose he wants the purchase money, the vendor should refuse to answer. It is true that on a sale by an executor of the testator's free estate the purchaser is not entitled to inquire whether any debts remain unpaid unless there is something in the transaction which shows the contrary: *Re Venn and Furze's Contract*.[9] But the wording of the Settled Land Act seems to show that this principle does not apply to settled land. By section 110 (3), the purchaser "is entitled to act" on the assumption that the executor requires the money for purposes of administration. But, by subsections (2) and (5) a purchaser is "bound and entitled" to make certain assumptions. This seems

[9] [1894] 2 Ch. 101.

to show that section 110 (3) imposes no prohibition on inquiries by the purchaser. This view is supported by *Re Duce and Boots Cash Chemists (Southern), Limited's Contract.*[10] It must also be remembered that the protection given by the Trustee Act, s. 17, to a purchaser paying money on a sale by trustees (including an executor) applies only where the sale purports to be made under a trust or power vested in the trustees or executor, and it is submitted that the trust or power relied on must be specified in the conveyance, and that the purchaser is entitled to be informed of the nature of the trust or power, although he is not concerned to see that the money is wanted. This is especially important where the land is offered for sale several years after the death of the tenant for life and it is unlikely that any duty remains unpaid.

But, however that may be, would refusal to answer the inquiry be wise? As the *Law Times* states, such inquiries are commonly made and usually answered; and I have never heard of any difficulty arising from this practice. If the sale is for an authorised purpose, what harm can be caused by disclosing the reason for the sale? If death duties or other capital moneys have to be raised, the sale is clearly lawful. So why not say so? The odd thing is that when the duty is raised by mortgage, the usual practice is to recite the fact in the mortgage deed: see 10 *Encyclopedia of Forms and Precedents* (3rd ed.) p. 197. Why should not the same practice be followed on a sale? If the executor's solicitor has any doubt as to the regularity of the sale, he should reply that, if the purchaser would prefer it, the executor will execute a vesting assent in the next tenant for life, and the solicitor should be grateful to the purchaser for saving him from the risk of an action for negligence.

Finally, it is submitted that the *Law Times* appears to be concerned only with the protection of the purchaser, and I would again assert that it is only when the executor's power to sell does not exist or is in doubt that the protection of the purchaser has to be considered, and this should never happen; for an executor should never be advised to sell when the power is in doubt.

[10] [1937] Ch. 642

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Bankes v. *Salisbury Diocesan Council of Education Incorporated and another* [1960] 2 W.L.R. 916; [1960] 2 All E.R. 372 (Ch.D.)

School site—reverter—conveyance to individuals and corporation sole—words of limitation—School Sites Act, 1836.—A conveyance of land under any of the School Sites Acts normally creates a determinable fee simple in the grantees with possibility of reverter to the grantor on the land ceasing to be used as a school. Such a fee simple, though not absolute, may subsist as a legal estate after 1925 (Law of Property Act, 1925, s. 7 (1).) On the school closing there is automatic reverter to the grantor so that continued possession by the grantees is adverse and bars the grantor's title after twelve years (see *Dennis* v. *Malcolm* [1934] Ch. 244; *Re Cawston's Conveyance* [1940] Ch. 27; *Re Ingleton Charity* [1956] Ch. 585). In the present case the school closed only in 1956, but it was argued that either the common law rules applicable to a conveyance of 1840, or a scheme approved under the Endowed Schools Act, 1869, had destroyed the grantor's title. The first ground of the claim involved so many obsolescent rules that one may describe the case as a period piece.

The story begins in 1840, when W. J. B., a tenant for life, made a conveyance by the authority of the School Sites Act, 1836 (later replaced by the School Sites Act, 1841). This conveyance was made by bargain and sale duly enrolled; it will be recalled that the present system of conveyances by simple deed of grant dates from the Real Property Act, 1845. W. J. B. conveyed to T. G. R. and C. M. T. " to hold . . . unto the said T. G. R. and C. M. T. to the use of the said W. J. B., T. G. R. and C. M. T. and their successors lords and stewards of the said manor and rector of the said parish upon trust " to use the land for a school and further declaring that if the school should not be provided the conveyance should be void. A conveyance by bargain and sale operated by way of use executed by the Statute of Uses, 1535; the effect of this statute was thereby exhausted, so that any further trusts or beneficial interests declared were necessarily equitable (Megarry and Wade, *The Law of Real Property,* 2nd edition, at p. 169). It will also be seen that W. J. B. in this conveyance employed the Statute of Uses to circumvent the common law rule against a man conveying to himself (Megarry and Wade, *supra,* at p. 165).

The first point of substance arose on the habendum set out above. At common law, alone applicable in 1840, the words of limitation required to pass a fee simple by conveyance *inter vivos* were " and his heirs " if the grantee was an individual or " and his successors " if he was a corporation sole. In the absence of such words (or, of course, words appropriate to create an estate tail) only a life estate passed.

(Co.Litt. 8a, 8b, 9b; Challis, *Real Property*, 3rd edition, pp. 221–223.) W. J. B. and T. G. R. were merely individuals, but C. M. T., as rector, was also a corporation sole. Russell J. held (1) the clause of defeasance on its proper construction applied whenever the land ceased to be used as a school and was not restricted to an immediate failure to provide a school; (2) the School Sites Act, 1836, providing that conveyances thereunder might be by bargain and sale enrolled and should be "valid and effectual" to vest the fee simple in the grantees (ss. 3, 5) did not dispense with the need for proper words of limitation in such conveyances; (3) consequently W. J. B. and T. G. R. took only life estates but the use of the word "successors" enabled C. M. T. as a corporation sole to take an undivided one-third share of the legal estate in fee simple; (4) nothing in the law prevented a corporation sole holding as trustee, citing *Tufnell* v. *Constable* (1838) 7 Ad. & El. 798 and Halsbury, *Laws of England*, 3rd. edition, Vol. 9, at p. 142, and distinguishing a passage in Blackstone's I *Commentaries* at p. 469; (5) the effect of the conveyance was to vest legal estates in the grantees, on trust to provide a school, with a resulting trust for the grantor. The third of these points illustrates the rule that a joint tenancy requires unity of time, title, interest and possession—here unity of interest was lacking; after 1925, of course, the Law of Property Act, 1925, imposes a trust for sale of the legal estate (ss. 34–36) so this rule affects only the notional or actual proceeds of sale. On the fifth point, it may be mentioned that there may be a legal as well as an equitable determinable fee (*Re Ingleton Charity, supra*).

It was conceded that, if none of the grantees had taken more than a life estate, the dependants would have established a possessory title defeating the grantor's successor. It was also conceded that no such possessory title was established if C. M. T., the rector, obtained an undivided share in fee simple. The reasons for this latter concession are not mentioned in the reports, but would seem to be first, the rule that possession is to be referred to a lawful origin if possible, combined with the right of any tenant in common to possess the whole in common with his co-tenants (see Preston and Newsom, *Limitation of Actions*, 2nd edition, at p. 71; *Moses* v. *Lovegrove* [1952] 2 Q.B. 533—cited in argument), and second, the rule that a trustee cannot possess trust property adversely to his beneficiaries (Preston and Newsom, *supra*, at p. 168).

The last lap of the case, as Russell J. described it, was the argument that a scheme made in 1949 under the Endowed Schools Act, 1869, not only vested the whole legal estate in fee simple in the defendants (as was agreed) but also destroyed the resulting trust in favour of the grantor. This suggestion was rejected by the learned judge after a careful analysis of the Act and the scheme. Consequently the defendants now held the land in trust for the plaintiff absolutely and beneficially. It may well be that more cases of this kind will come before the courts as our present educational system replaces that of the nineteenth century.

As a fairly irrelevant footnote, it may be added that the Judicial Committee of the Privy Council decided, in *Thero* v. *Wijewardena* [1960] 2 W.L.R. 954; that a Buddhist temple is not a juristic person and cannot hold property. As the decision depended on the

effect of legislation applicable only in Ceylon, it does not seem to require any fuller note.

Ackroyd v. *Hasan* [1960] 2 W.L.R. 810; [1960] 2 All E.R. 254 (C.A.)

Estate agent—commission—principles for construction of contracts of agency.—The Court of Appeal (Sellers, Ormerod and Upjohn L.JJ.) has affirmed the decision of Winn J. (noted *ante,* Vol. 23, at p. 305), though disagreeing with some of his reasoning. In so doing the court has examined at length in considered judgments the principles applicable to contracts between estate agents and their clients, and is therefore, at any rate for the time being, the latest authoritative pronouncement on this vexed topic. (Probably, as Lord Greene M.R. said in another connection in *Eccles* v. *Bryant* [1948] Ch. 93 at p. 96, " this case is one of that long series of cases which no doubt will go on as long as contracts take place. . . .")

At first instance Winn J. had felt himself " constrained by the philosophy " of recent decisions to hold that in effect estate agents could not claim commission unless an actual contract came into being. This philosophy the Court of Appeal has emphatically rejected. All three Lords Justices stated, in varying words but with emphasis, that the right to commission depends on the construction of the contract, that there are no special principles applicable to such contracts, and that a provision for commission in the absence of a contract for sale must be expressed in clear language (referring to *Luxor (Eastbourne), Ltd.* v. *Cooper* [1941] A.C. 108 and *Midgley Estates, Ltd.* v. *Hand* [1952] 2 Q.B. 432). Consequently the words of each contract must be construed on their merits, though as the present decision shows, earlier decisions on similar words will have considerable influence.

Here the relevant words were " our introduction of a party prepared to enter into a contract . . . on such other terms to which you may assent." In the event all went smoothly until, the purchasers having signed their part of the contract, the vendor was asked to sign her part, but refused to do so because it was discovered that there had been misunderstanding about the need to retain a room. Upjohn and Ormerod L.JJ. (Sellers L.J. *dubitante*) held that there had come into being an unconditional offer by the purchasers which the vendor was entitled to accept. Consequently, had the words " prepared to enter into a contract " alone been in issue, the agents would have been entitled to commission (referring to *John E. Trinder & Partners* v. *Haggis* [1951] W.N. 416 and distinguishing *Graham and Scott (Southgate), Ltd.* v. *Oxlade* [1950] 2 K.B. 257 on the ground that the offer there was qualified). The above phrase would therefore seem to provide the " clear and unequivocal " language required (*Dennis Reed, Ltd.* v. *Goody* [1950] 2 K.B. 277, *per* Denning L.J. at p. 288). However, the further words " terms to which you may assent " proved a fatal stumbling block to the plaintiff's claim, because it was clear that as soon as the defendant saw the full terms of the contract she dissented therefrom. Both estate agents and their clients

may do well to note the significance here attributed to the phrases used.

---

2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Compton v. *Compton*
[1960] 2 All E.R. 70 (P.D. & A.)

Variation of settlements—post-nuptial settlements—guilty wife as trustee and appointor—Matrimonial Causes Act, 1950, ss. 24, 25.—The parties married in 1942 and four children were born (two daughters and two sons), the youngest in 1947. In 1958 the husband divorced the wife on the ground of adultery.

The husband settled £25,000 on each child, the wife and Baring Bros., Ltd. being the trustees in each case. If the daughters died under twenty-two the wife was to be paid accumulated income, an interest which she agreed should be extinguished. The wife received no benefit under the settlements on the sons but was entitled to exercise a power of appointment to the daughters if either son died under age. Marshall J. held that these settlements came within the Matrimonial Causes Act, 1950, s. 25, as "post-nuptial settlements made on the parties whose marriage is the subject of the decree," regarding power over property as here equivalent to property and citing *Hargreaves* v. *Hargreaves* [1926] P. 42. Here "on the parties" is generously construed; the word "settlement" is also of very wide import—*Prescott* (*orse Fellowes*) v. *Fellowes* [1958] P. 260 noted *ante,* Vol. 22, pp. 229, 389. The learned judge then first refused to remove the wife as trustee, on the grounds that no unsuitability had been shown and that this particular application should have been made to the Chancery Division and, second, refused to extinguish the powers of appointment, holding that no evidence of prejudice to husband or children had been shown.

The husband had also given to the wife very substantial sums of money, now worth some £227,000. Marshall J. ordered the wife to settle £140,000 thereof on the children of the marriage. This order was made under section 24 of the Matrimonial Causes Act, 1950, whereby the court may order a wife divorced (or judicially separated) for adultery, desertion or cruelty to settle any property to which she may be entitled in possession or reversion for the benefit of the innocent party and children. Marshall J. held, following *March* v. *March and Palumbo* (1867) L.R. 1 P. & D. 440 and *Lorriman* v. *Lorriman and Clair* [1908] P. 282, that the money had been given in the belief that the marriage would continue and the money be used after the husband's death for the benefit of his family, and that consequently there had been, as Lord Penzance had said in *March* v. *March and Palumbo, supra,* "a pecuniary change operated by the wife's criminality."

Re Neeld, decd. [1960] 2 W.L.R. 730; [1960] 2 All E.R. 33 (Ch.D.)

Condition subsequent—name and arms clause—whether words sufficiently certain—construction—time when beneficiary entitled to payment.—In noting *Re Murray, decd.* [1955] Ch. 69 for this journal (*ante*, Vol. 18, p. 614) the present writer remarked that "name and arms" clauses had fallen upon evil times after a placid and unquestioned career of some 250 years. The Chancery judges had seemed determined to hold such clauses void as both uncertain and, if applied to married women, contrary to public policy. (*Re Fry* [1952] Ch. 348; *Re Lewis* [1951] 2 T.L.R. 1032; *Re Bouverie* [1952] Ch. 400; *Re Wood* [1952] Ch. 406; *Re Kersey* [1952] W.N. 141.) The objection to these decisions was, of course, the introduction of uncertainty into a branch of the law hitherto thought to be certain, at any rate if the well-known precedent books were followed. In *Re Murray* itself the Court of Appeal carefully avoided giving approval to these decisions, but held the actual "name and arms" clause before it insufficiently certain because of the actual words used (see *ante*, Vol. 18, at p. 615). In the result it seemed unlikely that any "name and arms" clause would satisfy the recognised test that "the condition must be such that the court can see from the beginning precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine" (*per* Lord Cranworth in *Clavering* v. *Ellison* (1859) 7 H.L.C. 707, at p. 725).

In the instant case Cross J., after commenting on the unsatisfactory state of the law, upheld two "name and arms" clauses, after supplying in one certain omitted words by reference to the other clause (referring to *Re Murray, supra*). Here the vital words were "take . . . and use on all occasions" and "discontinue to use," to which latter phrase the learned judge said "on all occasions" must be added as a matter of construction. The three words "on all occasions" enabled Cross J. to distinguish *Re Bouverie, supra,* and *Re Wood, supra* (where "use," "disuse" and "discontinue to use" were the phrases) and uphold the clause as sufficiently certain, following *Re Drax* (1906) 22 T.L.R. 343, where the three relevant words appeared, and were held to mean use on all occasions when a surname is ordinarily used. The learned judge also distinguished *Re Kersey, supra* (where Danckwerts J. held contrary to public policy a clause requiring a husband to change his name on his wife's losing property) saying "I do not think the fact that a clause may be invalid so far as it applies to married women and their husbands is any sufficient reason for holding it totally void even as applied to males or spinsters" ([1960] 2 W.L.R. at p. 739; [1960] 2 All E.R. at p. 39). In other words, a "name and arms" clause may be good or bad according to the marital status of the beneficiary.

On three subsidiary points Cross J. held (1) forfeiture would ensue from discontinuance of user after as well as within the one year period within which beneficiaries were required to assume and use the name and arms, following *Re Drax, supra*; (2) so far as a gift of residue was concerned, time—the one-year period—ran from the first moment the beneficiary became entitled to income of the residuary estate; as no income had been paid or assent made, and

administration was incomplete, time had not yet begun to run; (3) so far as an equitable interest under a specific devise was concerned, the devisee became entitled at once (subject to defeasance if the property was required for administration) as he would have done before the Land Transfer Act, 1897 (following *Re Varley* (1893) 68 L.T. 665). This was so even though the devisee could not call for a vesting assent under the Settled Land Act, 1925, because an application under the Inheritance (Family Provisions) Act, 1938, was inhibiting distribution (*Re Simson* [1950] Ch. 38).

This decision underlines the unsatisfactory state of the law. "On all occasions" may now be a phrase which will validate otherwise uncertain clauses—compare "permanent" in relation to residence—*Re Gape* [1952] Ch. 743. But will the courts' policy now be to uphold or destroy "name and arms" clauses? If the beneficiary is a spinster, can she avoid the application of the condition by marriage within the period nominated for compliance? And does the condition apply if she again becomes discovert, as the restraint on anticipation used to do? Lastly, it seems, with respect, unfortunate that pre-1897 distinctions between real and personal property should continue to apply today. An authoritative and as far as possible comprehensive pronouncement on "name and arms" clauses by a higher court would be of great value. If the present case goes higher it is to be hoped that the Court of Appeal will be able to consider the matter more generally than was done in *Re Murray, supra.*

---

3. *WILLS*

By A. Kiralfy, Barrister-at-Law

In the Estate of Cocke, decd. [1960] 2 W.L.R. 491; [1960] 2 All E.R. 289

Successive wills—later will incomplete—dependent relative revocation.—A testatrix made a valid will leaving her residue to her executor X. She then executed a fresh will, containing a revocation clause, making X her executor and devising and bequeathing her residuary estate to X on trust, but without specifying the trusts. It was held, in an unopposed action, that the gift of residue in the earlier will was unrevoked, since the revocation in the latter will had been impliedly conditional on the effectiveness of some gift of residue in the later will. The second will was obviously incomplete when executed. Otherwise the imposition of a trust on X would have prevented his taking beneficially. *Garrett Botfield* v. *Garrett Botfield* [1901] P. 335 was referred to.

(Theobald 33, 48)

In the Estate of Little, decd. [1960] 1 W.L.R. 495.

Will on several unattached sheets—validity—filling in of blank space after execution—execution.—The testator had his solicitor prepare a will in several separate loose sheets. He signed them and had his signature attested without anything having been done to fasten the sheets together. Sachs J. held that it was sufficient if the testator pressed all the sheets together, and in this case the evidence showed that the sheets had been arranged in a neat pile with the sheet containing the space for signature on top. The signed sheet had clearly been intended to be the last. *Lewis* v. *Lewis* [1908] P. 1 was applied.

A legacy had been inserted on the last page in a blank space left over the signature after the signature and attestation had been written. It was held that the legacy was void, since it had been added after the will was executed. Finally it was held that the will ought not to be treated as having been made on condition that this added legacy was effective, even if the testator intended to add this legacy all along. In case of doubt a will must be saved—*ut res magis valeat quam pereat. Gregory* v. *Queen's Proctor* (1846) 4 Notes of Cases 620, and *In b. Arthur* (1871) L.R. 2 P. & D. 273 were referred to. This case shows the more liberal interpretation of when a signature is at the " foot or end " of a will. The leaving of a space for an unattested disposition was held not to prevent the original signature and attestation being at the end of the original will. It also shows the liberal admissibility of evidence in probate practice as to what constitutes the will and as to the state it was in at the time of execution.

(Theobald 35)

---

4. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Mascherpa v. *Direct, Ltd.* [1960] 1 W.L.R. 447; [1960] 2 All E.R. 145 (C.A.)

Forfeiture—action for forfeiture—counterclaim for relief against forfeiture—discovery of documents.—The plaintiffs in this case brought an action for forfeiture of a lease. The defendants counterclaimed under the Law of Property Act, 1925, s. 146 (2), for relief against forfeiture. The Court of Appeal held that, although a court will not make an order for discovery of documents in an action for forfeiture for the purpose of establishing the forfeiture, an order of this nature may be made in cases where there is a counterclaim for relief against forfeiture, since the counterclaim may raise issues other than the issue of forfeiture itself. The pleadings in the present case did raise other issues, *e.g.*, the financial soundness of the defendants. An order of the Official Referee, ordering the defendants to file an affidavit of documents, excluding documents relating to the issue of forfeiture, was, therefore, upheld.

Wine Shippers (London), Ltd. v. *Bath House Syndicate, Ltd.*
[1960] 1 W.L.R. 613; [1960] 2 All E.R. 511 (Ch.D.)

Landlord and Tenant Act, 1954—business premises—application for new tenancy—landlord's intention to demolish or reconstruct—practice—discovery of documents.—The landlords in this case opposed an application for a new tenancy of certain business premises on the ground that they intended to demolish or reconstruct the premises (see Landlord and Tenant Act, 1954, s. 30 (1) (*f*)). The tenants in an affidavit "did not admit" that the landlords had the requisite intention. The master adjourned the summons into court not only for cross-examination on the affidavits but also for the giving of oral evidence in chief. Buckley J., after reviewing the cases on the meaning of the word "intention" in this context, held that, although discovery of documents is unusual in proceedings commenced by originating summons, the special circumstances of this particular case justified him in making an order for discovery limited to the question whether or not the landlords had a firm and settled intention within the meaning of the authorities. The affidavits in this case did not contain all the evidence in chief, so that the issues of fact had not been clearly defined. It was necessary, therefore, in his view, that the tenants should have a limited order for discovery in order that they might put themselves in a position properly to cross-examine.

Pike v. *Michael Nairn & Co., Ltd.* [1960] 2 W.L.R. 897;
[1960] 2 All E.R. 184 (Ch.D.)

Landlord and Tenant Act, 1954—practice—originating summons by tenants for grant of new tenancy—no service on landlords—application to dismiss summons for want of prosecution—whether landlords entitled to be heard.—This case, in the view of Cross J., illustrates how urgently the existing procedure in cases under Part II of the Landlord and Tenant Act, 1954, (see R.S.C., Ord. 53D) is in need of reform. On April 13, 1959, the tenants, who had already received a notice from their landlords to terminate their tenancy of certain business premises, took out a summons asking for a new tenancy; but they did not serve this summons on the landlords. On May 7, 1959, however, the tenants, in the hearing of a representative of the landlord's solicitors, who happened quite fortuitously to be in the room at the time, obtained an order that the summons should stand over generally with liberty to restore. Then on February 24, 1960, the landlords took out a summons asking that the tenants' summons should be dismissed for want of prosecution; but the tenants contended that unless and until the originating summons had been served on the landlords, the landlords could not be heard. Cross J. held that the landlords could waive service of the summons upon themselves and could claim to be heard on it. A defendant has always been able to waive service of a writ and enter an appearance to it: an originating summons is analogous to a writ: and R.S.C., Ord. 53D, r. 5 (1), dispenses with the need to enter an appearance in the case (*inter alia*) of applications for a new tenancy under section 24 of the Act of 1959.

In this case, however, a return day had been obtained and the landlords did get to know of the originating summons. Had there been no return day, the position might have been very different, even though the landlords had found out about the summons. "So long as the rules contain no provision for the automatic dismissal of a summons, which is not promptly served," said Cross J., "there appears to be nothing to prevent an applicant from issuing a summons and putting it in his pocket." And, when once such a summons has been issued, a tenancy is automatically prolonged till three months after the application has been disposed of (see s. 64 (1) of the Act).

The learned judge also suggested, in order to prevent abuse of the procedure so far as possible, that where applicants obtain a return day and the respondents do not appear, the masters should direct service of a summons, which has not already been served, unless they are satisfied that the respondents do in fact know of its issue and consent to its standing over.

Re Strand and Savoy Properties, Ltd. [1960] 3 W.L.R. 1; [1960] 2 All E.R. 327 (Ch.D.)

Option to renew lease—lease for thirty-five years—option to renew for a further thirty-five years at end of term—validity of option—Law of Property Act, 1925, *s.* 149 (3).—This case raises a new point on the construction in relation to contracts to grant leases of section 149 (3) of the Law of Property Act, 1925. That subsection provides that "a term granted at a rent or in consideration of a fine limited after the commencement of the Act to take effect more than twenty-one years from the date of the instrument purporting to create it shall be void and any contract made after such commencement to create such a term shall also be void."

By a lease dated November 1, 1928, for a term of thirty-five years from June 24, 1926, the landlords undertook that they would, at the written request of the tenant made twelve months before the end of the term, grant him a lease of the premises for a further term of thirty-five years from the expiration of the original term. The plaintiffs (assignees of the lease) purported to exercise this option; but the defendants (assignees of the reversion) contended that the option was void on the ground that it was a contract made after 1925 to create a lease which would commence at a date more than twenty-one years after the date of the contract. The plaintiffs contended, on the other hand, that although section 149 (3) of the Act invalidates any contract by which a man undertakes to create a reversionary term which will not commence until twenty-one years after the date of the instrument creating the term, it does not invalidate a contract to create a lease, at however remote a date in the future, which, when it is granted, will create a term which will take effect within twenty-one years of that lease. Buckley J. decided in favour of the plaintiffs. Section 149 (3) is confined, in his view, so far as contracts are concerned, to contracts to create terms which, when created, will only take effect more than twenty-one years from the dates of the instruments creating them.

Beesly v. *Hallwood Estates, Ltd.* [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314 (Ch.D.)

Option to renew lease—failure to register option as estate contract —whether option binding on assignee of reversion—negotiations for new lease on faith of option—execution of new lease by assignee—effect of new lease.—A lease for twenty-one years from March 25, 1938, gave to the tenants the right to obtain a further lease for twenty-one years upon certain conditions on giving at least six months' notice in writing expiring prior to the determination of the original term. In 1948 this lease was assigned to the plaintiff; in 1955 the freehold reversion was purchased by the defendants; and on July 1, 1958, the plaintiff served a notice on the defendants exercising the option. But the option had never been registered as a land charge under the Land Charges Act, 1925. At the time, however, both parties believed that the option was binding on the defendants, and negotiations for a new lease were carried on by correspondence on that footing. And in September 1958 the defendants, still believing that the option was binding on them, attached their seal to a new lease and the plaintiff executed a counterpart. But in October 1958, having then been advised that the option was void against them for lack of registration, they refused to grant a new lease.

Buckley J. held first, that the option to renew the lease, being an "estate contract" within the meaning of section 10 (1) of the Land Charges Act, 1925, was indeed void against the defendants for lack of registration. An option to renew a lease is not a contract (not even a conditional contract) to convey or create a legal estate. It is merely an offer to grant a further term which a landlord is contractually precluded from withdrawing so long as the option remains exercisable. But an estate contract is defined by the statute as "including" a valid option of purchase, and "including" in this contract must mean "which for this purpose shall be treated as including." An option to renew a lease, therefore (since "purchase" in this Act includes "lease"), is within the second limb, though not within the first limb of section 10 (1), Class C (iv) of the Act.

Nor is the position affected by section 142 (1) of the Law of Property Act, 1925. That section only renders obligations to which it applies enforceable against a reversioner "if and so far as the lessor has power to bind the reversionary estate." It does not, in the view of Buckley J., "empower a lessor to bind a reversioner in respect of any obligation which the legislature has said shall not be enforceable against such reversioner."

The learned judge also rejected a contention on behalf of the plaintiff that a new contract could be spelt out of the correspondence between the parties on the subject of the new lease. These letters were written with the sole intention of carrying out what were believed to be existing legal obligations. There was no intention to create any new obligations. Nor was there even any acceptance of an unqualified offer in the letters.

But by sealing, and thereby delivering, the new lease the defendant company had effectively bound itself to its terms, conditionally only upon the plaintiff executing a counterpart of the lease (see Law of Property Act, 1925, s. 74). There was no intention on the part of the

directors at the time of the sealing that any other condition should be imposed; and the mutual mistake of the parties, who both believed the option to be binding, was a mutual mistake of general law, which afforded no defence.

---

5. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*: Where a case is not reported in any of the general series of law reports it is cited from *Taxation Reports* (T.R.).)

Re Boulton [1960] 1 W.L.R. 140; [1960] 1 All E.R. 553; [1960] T.R. 17 (C.A.)

Estate Duty—Incidence

Statutory provision: Finance Act, 1894, s. 9.

Point: By the Finance Act, 1894, s. 9 (1), the rateable part of the estate duty on an estate in proportion to the value of any property which does not pass to the executor of such shall be a "first charge on the property in respect of which duty is leviable." If estate duty is levied upon part of an estate and the levy is correct in respect of such part, then whether or not a levy could have been made on the rest of the estate (although not in fact made) the burden of such levy must be borne by the part which attracted it.

Facts and decision: A trust fund was settled upon two sisters, A and B. The relevant trusts were to A for life with remainder to her issue and in default of issue of A, to B for life with remainder to her issue and in default of issue of B, then to such of them, X, Y and Z as should be living at the death of the survivor of A and B (or failure of their issue) or should have previously died leaving issue then living, which issue would take *per stirpes*. B, whilst A was alive, by deed provided that when her interest fell into possession it should be held so that the persons who would have taken on each distribution date were she then dead should take between them and in the appropriate proportions the income of the estate, subject to the qualification that she retained for her personal enjoyment an annual sum of £3,000. A then assigned to X her life interest in one-third of the trust fund, the intent being expressed that the life interest to that extent should merge in the reversionary interest of the assignee. As a matter of law, no merger took place, as X only had a contingent reversionary interest. B then released the £3,000 a year she had previously retained. A then died and later B died, neither having married; X surviving both. In consequence, X was at all material times after the second release by B entitled to one-third of the income and such interest became absolute

and indefeasible on the death of B. Estate duty was claimed on the death of A upon two-thirds of the trust fund only, the Estate Duty Office not considering that the one-third to which X was entitled was dutiable. The question was raised whether the burden of such duty fell upon the two-thirds of the trust fund in respect of which the Estate Duty Office claimed the levy, or on the whole trust fund, there being no divided one-third and, as stated above, no merger in respect of that one-third.

Held: The burden fell upon the two-thirds in respect of which the duty had been levied.

The case is interesting in that the Estate Duty Office did not claim duty on the one-third to the income of which X was entitled. There had been no merger and there was no means whereby a distinct subject-matter had been or could be set aside for that one-third. Although, as the court indicated, the Estate Duty Office view corresponds "quite manifestly with common sense," it appears to form an interesting example of the Estate Duty Office taking note of the practical effect rather than the legal result of dispositions.

Duple Motor Bodies, Ltd. v. *I. R. C.* [1960] 1 W.L.R. 510; [1960] 2 All E.R. 110; [1960] T.R. 65 (C.A.)

Income Tax—Computation of profits—work in progress

Statutory provision: Income Tax Act, 1952, s. 127.

Point: For the purpose of ascertaining the full amounts of the profits or gains of a trade, it is or may be necessary to bring into the account at the beginning and at the end respectively of the relevant period the values of the work in progress or the stock in trade, or perhaps both. In the ordinary case, such values will be arrived at by taking the market value or the cost, whichever is the less. To ascertain cost price for work in progress, various accountancy methods are used. The object of the exercise, which is the finding of a fair, true and reasonable assessment of the real profits of the business for the period, makes the selection of the method adopted a question of fact in each case. The method used must be justified in the business concerned and the court will not lay down what is the correct method to be used as a matter of general principle.

Facts and decision: The company built motor-vehicle bodies to order, and the work in progress at the end of the year had then no market value. Such work was therefore entered into the accounts at cost and the company had always adopted the *direct cost* method. By this method, the value was ascertained by reference to what had been expended exclusively on the work in progress broadly, material used and wages of labour directly employed. This method produced a loss of £2,000 in the year 1951–52. The Crown contended that the *on-cost* method should have been used, whereby in addition to the direct cost a proportion of the overheads of the business was included. Trade having been slack, overheads increased the cost of production and by this method a profit of £14,000 would have been found in the relevant period. The Commissioners decided in favour of the on-cost method,

which decision Vaisey J. reversed, holding that both methods being accepted methods of accountancy, the choice by the directors was decisive. The Crown appealed.

Held: The directors' choice was not conclusive, but there was some onus on the Revenue to justify a change of a system previously adopted. The direct cost method on the particular facts of the case produced a fair result and it having been found that either method would produce a true figure for profits, the company were entitled to use the direct cost method.

Leave to appeal to the House of Lords was granted by the Appeal Committee [1960] 1 W.L.R. 621.

---

6. *MISCELLANEOUS*

Walls v. *Peak* [1960] 2 W.L.R. 840; [1960] 2 All E.R. 81 (C.A.)

Rating—" dwelling-house "—flatlet house.—In this case, excluding the kitchen, bathroom, etc., a building consisted of twelve rooms, of which the owner and his family occupied five, the remaining seven being let off as bed-sitting rooms. If the premises were to be rated as a dwelling-house the gross value for rating purposes would have been £110; if not, £250. Section 3 of the Valuation for Rating Act, 1953, provides that a "dwelling-house" means a hereditament used wholly for the purpose of a private dwelling or private dwellings, but excludes a hereditament where the whole, or substantially the whole, of the available accommodation is used for the letting of rooms singly for residential purposes. The Lands Tribunal, following some of its earlier decisions, held that the premises were not a dwelling-house because there should be excluded from consideration that part of the accommodation which the owner and his family, in the ordinary case, required for themselves. It was pointed out that if this view were right, then, if the owner required all the rooms but one, which he let off for residential purposes, the hereditament would not be a dwelling-house, and the Court of Appeal allowed the appeal. It would seem that, unless the owner reduces the accommodation to the bare minimum, say one or two rooms, his premises will be treated as a dwelling-house. The Court of Appeal mentioned, but did not discuss, the case where the seaside landlady lets off as much as she can for the summer season.

Peak v. *Burley Golf Club* [1960] 1 W.L.R. 568; [1960] 2 All E.R. 199 (C.A.)

Rating—golf course on common—rateable occupation.—In this case two golf clubs occupied under licence, parts of the New Forest, but subject to the rights of the commoners. The public had access to the golf courses and used them for picnicking, parking caravans and even playing golf without paying green fees. The Lands Tribunal held that the golf clubs were in rateable occupation of the courses. The Court

of Appeal adopted the guide in *John Laing & Son, Ltd.* v. *Assessment Committee for Kingswood Area* [1949] 1 K.B. 344, 350: "First, there must be actual occupation; secondly, it must be exclusive for the particular purposes of the possessor; thirdly, the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period." The sole question was whether the second requirement was fulfilled. The Court of Appeal, in allowing the appeal, held that the evidence did not disclose that the clubs had exclusive possession for the purposes of the golf courses. The clubs appear to have been wise in not excluding the public from playing golf without the payment of green fees, but, even if they had attempted to do so, it would appear that the public rights were sufficiently substantial to prevent the clubs having exclusive occupation for their particular purposes.

THE LIBRARY

Gentlemen of the Law. By Michael Birks. Stevens & Sons, Ltd. 304 pp. (£1 5s.)

The house of Stevens is now 150 years old and as penance for all the solid heavy learning it has published it has shown us what it can do if given an excuse. The binding, the printing and the paper, indeed the whole book, are a joy to the eye. It is singularly free from clerical errors: we only spotted two. There are fifteen illustrations, from the Charles I attorney to the modern solicitor's office, a little too delightful to be true for the vast majority, but it keeps before us a target to which we may wistfully aim. These illustrations are of considerable interest in their own right, but are also a commentary on the text. Some are familiar, but are none the worse for that. (We must thank someone for not reproducing the awful "A Guid Ganging Plea" which disfigures so many English solicitor's offices.) Do not be put off by the price: the book should really cost about twice as much.

A book, however handsome, is not worth having if its contents are not worth reading, but, if the publishers have taken the trouble to honour the author, he has returned the compliment. The author has been Principal Clerk to the Chancery Registrars since 1953 and has taken as his subject the history of solicitors and, so far as possible, has used actual individuals from whom to draw his general picture. Nevertheless, so well has the author done his task that he has entirely succeeded in combining a scholarly history with the lively glimpses into the lives of numerous solicitors and attorneys. In our opinion the extracts which appeared before publication in the Law Society's *Gazette* do not do justice to the book. It is probable that common fallacies about the history of solicitors will be revealed to many of us. For example, we doubt whether it is general knowledge that solicitors were originally men of affairs instructing attorneys long before they became solicitors of the Court of Chancery.

The author's style is very attractive. It is obvious that the earlier history, with its extracts from contemporary records, is bound to be a little hard going, but that is no fault of the author's, who is always clear and pleasant to read. It is free of clichés, except for one, the familiar statement that our system is the admiration of the world. If this were really true, why do not other countries, like Scotland and Ceylon, abandon their present systems and why did Japan deliberately reject the English system and adopt Continental models? Why anyone should admire our Chancery procedure, our constructions of wills or our criminal technicalities we do not know. On one occasion the word "scotch" is misused to mean kill, the antithesis of its meaning. To find only two such grounds of criticism is witness to the high excellence of the writing.

It would not be fair to give the impression that this is one of those learned tomes to be given to others, but not to be read oneself. On the contrary, a happy turn of phrase here, an anecdote there, buoys up the book without in any way detracting from its scholarly merit. Life may be long, but, thank heaven, it is not always earnest; our predecessors fell off horses, missed summonses and dined well.

After taking us down to the first world war, when we are told that financially solicitors' fortunes had reached their zenith, the author takes us to the colonies. In parts of Australia fusion has taken place in theory, though not in practice. This is a rare exception. The general tendency is towards fusion. He does not tell us that opposition to Torrens has more or

less killed conveyancing for solicitors in South Australia. The notary has nearly died here, the avoué is almost extinct abroad.

Then in the last chapter there is one of the least biased accounts of the present position and prospects for the future that we know. The author does not appear to think that the future is particularly rosy for either branch of the profession. The newer professions such as accountancy and, presumably, surveyors, are taking over some traditional solicitors' work; but is not this view too pessimistic? The solicitors' sphere has not been demarked and delimited once for all; he is a chameleon and, if the pattern changes, he is not lost but slowly changes his colour. We have lost banking, but our clients are now more widely drawn than ever before. If the bell has tolled for unregistered conveyancing, we should not complain too much, for we cannot spare the time for the long abstracts and we have not got the staff to copy them.

We are told that solicitors make their way down the passage of time, as they go to heaven, softly. There is a moral in this: the Bar think it unseemly to move in the company of solicitors. Where they will go we do not know, but it seems reasonable to suppose that the solicitors will be accompanied by the law publishers.

E. F. G.

We have also received:—

Conveyancing Costs. Third edition. By J. L. R. Robinson. 95 pp. (12s. 6d.). *Guide to Practical Conveyancing.* Second edition. By Edward Moeran. 101 pp. (12s. 6d.). Nos. 20 and 44 *Oyez Practice Notes.* The Solicitors' Law Stationery Society, Ltd.

The first of these two little books, after setting forth notes and comments on the scales, including the non-contentious probate "scale," then sets forth the scales in tabular form. Technically, we can hardly object that stamp duties, estate agents' fees and Land Registry fees are not dealt with, but these would have increased the usefulness of the tables. Similarly, the Building Society Scale might have been put into the tables. Finally, there are a few precedents, followed by the Acts and Orders.

Moeran's lively little book contains some useful hints on running a conveyancing practice. There are few errors, but it might be mentioned (p. 33) that on first registration a certified copy of the transfer is required. It is not clear what effect the author has in mind by the mere deletion of Condition 36 (4) of the Law Society's Conditions of Sale (p. 21). Searches are effective for fourteen *working* days, not merely fourteen days (p. 37). One suggestion of the author is unhappy. He does not like the Building Society scale and suggests padding it out by charges for attending at the Land Registry, stamping and so on. He usually tells us all about the Law Society's views but he omits their views on this! As these nibbles must come off the mortgagor's solicitor's bill if the borrower is not to pay twice, the author is here advocating dog eat dog. Is it not time solicitors rose above this?

The Estates Gazette Digest of Land and Property Cases, 1958. Edited by Peter Ash, M.A., Barrister-at-Law. The Estates Gazette, Ltd. xi, 348 and (index) 3 pp. (£2 5s.)—It is perhaps unnecessary to remind readers that this is a volume of reports and not a digest. It is intended primarily for members of the estate profession, but is nevertheless a useful supplement to the ordinary law reports, particularly for its Lands Tribunal reports on compensation, restrictive covenants and rating. It is also well known that important decisions not to be found elsewhere are often secreted in these Digests. Of a previous volume, some objection was taken in this journal to the arrangement. This has now been considerably improved, but it is not clear why cases which are known to have been upset on appeal are reported.

When a subject, like the Landlord and Tenant Act, 1954, is developing rapidly, it is useful to collect the cases together in the way the Digest does. For those whose practice takes them off the motor roads of conveyancing into the lesser ways and possibly into the lanes, these Digests are an asset and the cost is very reasonable.

Buying a House. By DUDLEY PERKINS, M.A., Solicitor. The Solicitors' Law Stationery Society, Ltd. 18 pp. (1s. 6d.)—This is a booklet for laymen, taken from the author's "Can I Help You?," telling the layman what the solicitor does when acting for a vendor or purchaser. The President of the Law Society in a foreword suggests that solicitors should put copies into their clients' hands so that they will understand why we do what we do. Would he advocate that doctors should do the same?

Jackson and Muir Watt, Agricultural Holdings. Eleventh ed. Second Cumulative Supplement (to January 1, 1960). By J. MUIR WATT, M.A. London: Sweet & Maxwell, Ltd. x and 33 pp. (7s. 6d.)

CORRESPONDENCE

To the Editor,
The Conveyancer and Property Lawyer.

Planning Blight by Road Schemes

Dear Sir,

The suggestion of the Ministry of Housing and Local Government in Circular No. 48/59 (as noted at p. 1 of the January/February issue), to the effect that local authorities should exercise a reasonable discretion to buy land in advance of requirements if it is blighted by a road scheme for which no formally approved plans exist, will be viewed with a jaundiced eye by any of your readers who have experience of the attitude of the Ministry of Transport in such cases.

I know of two cases where land fronting to a trunk road (for which the highway authority is of course the Minister of Transport) has been blighted by schemes for trunk road improvements which existed on paper but had not yet been put into a particular year's programme. It was suggested that the Ministry should purchase the land in question, because it was of little use to anyone else. The Ministry reply was to the effect that they were unable to purchase land in advance of requirements, but only for carrying out schemes which had been formally approved and budgeted for. Both cases arose since the passing of the Town and Country Planning Act, 1959, and the publication of Ministry of Housing and Local Government Circular No. 48/59.

You may consider that it would be helpful if, before advising local authorities on the policy to be adopted in these cases, the Ministry could ensure that the policy of another Ministry in the same situation would be made to conform.

Yours faithfully,

K. G. Haddock.

Hinckley, Leicestershire,
April 30, 1960.